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No. _____

In The

Supreme Court of the United States

October Term, 1993

RICHARD D. BARNETT,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

26 U.S.C. § 6672 assesses a 100% penalty against any responsible person who willfully fails to collect and/or pay the required withholding taxes from his or her employees.

1. What is the appropriate standard to be employed in reviewing jury verdicts in 26 U.S.C. § 6672 cases? More particularly, is the question of "responsible person" status a matter of law, to be reviewed by the court *de novo* on the basis of a litmus test which "invariably prove[s] dispositive of a finding of responsibility," or is the query properly addressed to the correctly instructed jury which is not "narrowly constrained" by certain determinative factors, but is free to decide the issue on the basis of the total facts and circumstances presented?

2. Who is a "responsible person" under 26 U.S.C. § 6672(a)? More particularly, is any corporate officer who is theoretically able to pay withholding taxes a "responsible person" even though the payment of such taxes is not among those powers or responsibilities delegated to him by the corporation and he could have only paid such taxes by engaging in *ultra vires* conduct?

3. What is "willful" conduct under 26 U.S.C. § 6672(a)? More particularly, does a nonwillful failure to pay employee withholding taxes automatically and retroactively become willful by a subsequent use of general corporate revenues that have no nexus to employee withholdings to pay general corporate expenses in order to keep the business operating?

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JURISDICTIONAL STATEMENT

This case was filed in the United States District Court for the Western District of Louisiana pursuant to 26 U.S.C. § 6672. Jurisdiction was granted by 28 U.S.C. § 1346(a)(1). The United States Court of Appeals for the Fifth Circuit rendered its decision on April 28, 1993. The petitioner timely filed an application for panel rehearing on May 12, 1993, which was denied by the court on June 1, 1993.

RELEVANT STATUTE

United States Code, Title 26

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax

(a) General Rule. – Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or payment hereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

STATEMENT OF THE CASE

In 1980, Charles R. Anderson ("Anderson"), a resident of Lake Charles, Louisiana, approached Richard D. Barnett ("Barnett"), who resided in Lafayette, Louisiana (70 miles east of Lake Charles), concerning the formation of an oil and gas drilling company. Barnett had met Anderson in 1978, while Anderson was the Vice President of Finance of a large

regional drilling contractor. 6 R 148. Anderson, a Certified Public Accountant, knew how to run the financial side of a drilling company while Barnett, an engineer, had a background in operating drilling rigs. 6 R 148.

The Anderson-Barnett Drilling Company, Inc. ("Anderson-Barnett") was incorporated with five shareholders, Anderson, Barnett, Michael Pratt, Pete Caldarero, and Blosclair Investment Corporation owned by David Levingston, each owning 20% of the stock. Anderson was made President and Chief Financial Officer of the company at the insistence of the investors. Barnett served as Vice President of Operations and James Harrington was the Secretary/Treasurer. 6 R 96.

The activities of the business were divided between Barnett and Anderson. The drilling operations were handled by Barnett out of the Lafayette office. His duties included reviewing daily drilling reports and handling day to day problems and occurrences during drilling operations (*i.e.*, problems with stuck pipe, twisted off pipe, or demands for supplies for the rig). 6 R 149. He was on 24-hour call in case there were problems on the rigs. *Id.* Anderson testified that Barnett was "in charge of all the field operations for the company, including running the rigs, basically hiring and firing the field personnel, and maintaining the office in Lafayette." 6 R 99. Anderson controlled and managed all of the bookkeeping, and all of the financial affairs of the company out of a separate office in Lake Charles. 6 R 97-98. He was the accountant for the company and handled the payroll. He also made the decisions on all disbursements. 5 R 73, 6 R 6, 6 R 19, 6 R 31, 37, 6 R 72, 6 R 98. The most input Barnett had into such decisions was to occasionally pass on a creditor's request to be paid. 6 R 151-52.

Anderson-Barnett opened a small checking account in Lafayette which was used to buy groceries and sundries for the rigs and field personnel. The company's payroll and operating accounts were in a Lake Charles bank, and all invoices and payments were handled out of the Lake Charles office. 6 R 150.

In May, 1981, Anderson-Barnett began to experience severe financial problems due to a "blow out" on a well that essentially stripped the company of its working capital. 6 R 121. When Barnett became aware of cash flow problems in the company, he hired Dorothy Level, a financial consultant, to evaluate the company. Ms. Level's requests for the company's books and other financial information were refused by Anderson. 6 R 125. At a meeting held March 27, 1982, Barnett was made President in an attempt to allow him to attract much needed financing. 6 R 154-155. However, Anderson retained the title of Chief Financial Officer.

After obtaining the approval of two other Board members and shareholders, Barnett went to Lake Charles and physically removed what company records he could obtain on April 9, 1982. 6 R 157-158. Inspection of these records led for the first time to a suspicion that withholding taxes were not being paid. 5 R 73, 5 R 106, 6 R 21 6 R 101, 114, 6 R 159. Prior to that time, Anderson had repeatedly assured Barnett that everything in the company's financial house was in order, including tax payments which he represented were up to date. 5 R 60, 61, 65, 74. Anderson subsequently confessed at a stockholder meeting on April 12, 1982, that he had not paid the taxes for the last four consecutive quarters, and resigned his job as Chief Financial Officer. 5 R 65, 6 R 156.

Barnett phoned the Internal Revenue Service ("IRS") on April 13, 1982 to report the problem, and followed up with a letter the next day. 7 R 152. Thereafter, he remained in constant contact with the IRS in order to secure its assistance to resolve Anderson's malefaction. 7 R 138. Solution of the problem was complicated by the IRS' loss of its file in 1985. However, Barnett again cooperated by reproducing the Anderson-Barnett files, and supplying them to the IRS. 7 R 138, 143.

Ultimately, the IRS assessed Barnett with the following penalties under 26 U.S.C. § 6672(a):

$116,839.74 for the tax quarter ended June 20, 1981,

$159,131.35 for the tax quarter ended September 30, 1981,

$148,327.53 for the tax quarter ended December 31, 1981, and
$180,211.30 for the tax quarter ended March 31, 1982,

for a total amount of $604,509.92. The IRS immediately offset refunds due to Barnett in tax years 1984 and 1985 against this amount. Barnett paid $200 toward this assessment on April 11, 1988, and on that same date timely filed a claim for refund of this payment and of the off-sets made by the IRS. 1 R 5. The IRS denied Barnett's claim on May 24, 1988.

Barnett instituted this suit to recover the amount paid by him and the amount off-set by the IRS (a total of $3,032.24) on December 29, 1988 in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, requesting trial by jury. 1 R 1, 8. The IRS filed a counterclaim against Barnett and Charles Anderson, seeking an assessment against them of a 100% penalty for taxes totalling $604,509.91 for the last three quarters of 1981 and the first quarter of 1982.

On April 4, 1990, the IRS filed a motion for partial summary judgment on its claim against Anderson, which was granted. *See* 25a, *infra*. Barnett's case was tried before a jury on February 18, 19 and 20, 1992.

The evidence at trial was all uncontroverted: since the IRS called no witnesses, every one of the witnesses who took the stand testified in Barnett's favor. The four stockholders and members of the Board of Directors of Anderson-Barnett (out of a total of five) who testified in this case all stated that the company was structured with Mr. Anderson as President and Chief Financial Officer because of his CPA license and finance background, and with Mr. Barnett as Vice President of Operations because of his engineering background and drilling experience. The Board and the owners intended a clear division of responsibility, with Mr. Anderson responsible for the fiscal management of the company, and Mr. Barnett responsible for the drilling operations of the company. Barnett had no understanding, experience, or ability to operate the financial side of the business, and Anderson was not an experienced driller. 5 R 50; 6 R 148, 154. Consistent with the

Board's intention, Barnett spent all of his time operating drilling rigs (a 24 hours a day job), while Anderson confined himself to managing the corporation and its finances. 6 R 141, 152. Accordingly, it is hardly surprising that the four shareholders (of five) who testified, all stated unequivocally that it was Anderson who had responsibility for payroll taxes, *not* Barnett. *See* 5 R 95, 6 R 37, 6 R 100, 6 R 154-55. In short, Barnett's assumption of any duties with regard to payroll taxes would have been an *ultra vires* act.

Moreover, the evidence established that Mr. Barnett not only lacked actual authority over fiscal matters, he lacked the ability to assume those responsibilities as well. To begin with, Mr. Barnett's complete lack of any knowledge of such matters was the very reason why Mr. Anderson was given the payroll tax responsibility. The evidence was undisputed that Mr. Barnett had "absolutely no" knowledge of bookkeeping, financial records, or any matters involving accounts payable or receivable. 5 R 50; 6 R 154. He was a drilling engineer, period. Moreover, on those occasions when Mr. Barnett asked for financial records, he was denied them. Little good they would have done him! As Mr. Anderson testified in response to the question, "were you trying to hide this from all officers": "I knew that we had a problem, and I really didn't want them to realize it." 6 R 119. While he denied "monkeying" with the books, he candidly admitted that it would have taken a CPA to find out that the taxes had not been paid because he conveniently did not keep the books "up to date." 6 R 120. Moreover, he hid IRS documents in his bottom desk drawer because "considering I knew what the problem was, I didn't feel like they should be sitting around somewhere." 6 R 112.

After the close of Barnett's case, the IRS moved for a judgment as a matter of law, which was denied by the trial court. 7 R 70. The jury returned a verdict in favor of Barnett, finding that he was not a responsible person for any of the four quarters at issue, and, further, that he was never a responsible person. 7 R 159-161. The IRS filed a renewed motion for judgment as a matter of law or, in the alternative, for a new trial. 2 R 307. The district court denied both motions, stating in transcribed oral reasons that he agreed

with and believed the jury's decision was correct under the circumstances and the facts:

> I don't think that the jury believed that he had the authority, because he didn't have the control. I think what that jury did was they looked at your chief number one star witness, Mr. Charles Anderson, who is a CPA, who controlled the books, who controlled the money, and who actually stated on the stand from what I recall that he hid everything from everyone else.
>
> * * *
>
> And I think under the circumstances, based on the testimony of Mr. Anderson – that he hid everything from everybody else, he took control, he was totally in control, he kept the funds there – Mr. Anderson was the and is the responsible party.
>
> * * *
>
> [I] think that the jury . . . had more than enough evidence to return a verdict in favor of Mr. Barnett in this case.
>
> * * *
>
> I think there was enough evidence presented that a reasonable jury of reasonable people could differ on that, and they obviously agreed with Mr. Barnett under the circumstances.

See 40a-41a, *infra.*

The IRS filed this appeal July 10, 1992. 3 R 373. The United States Court of Appeals for the Fifth Circuit reversed the jury verdict. *See Barnett v. Internal Revenue Service, supra.* Ignoring all of the other evidence presented in the case, the Fifth Circuit focused exclusively upon those facts that it felt were relevant to a "multi-factor" test for "responsibility" under 26 U.S.C. § 6672(a). *See* 15a, *infra.* Under this test, Barnett was found to be a "responsible" person "as a matter of law" because he fit the following fact pattern:

(1) he owned twenty percent of the Company's stock;

(2) he served as a director during each of the quarters for which taxes were not paid;

(3) he served as vice president until March 27, 1982, when he took over as president;

(4) he was responsible for the day-to-day operations of the Company, including hiring and firing employees;

(5) he purchased supplies with Company funds, reviewed vendor invoices before forwarding them to Anderson for payment, and made recommendations regarding which creditors to pay; and

(6) he had check-signing authority on all three of the Company's checking accounts, and at least once signed pay-roll checks as vice president.

14a-15a. The Court of Appeals found that, based on these factors, the IRS's motion for judgment as a matter of law should have been granted.

Since it found Barnett "responsible," the Court of Appeals went on to address the question of whether Barnett's conduct in not paying the four quarters of taxes was "willful," the second element of liability under 26 U.S.C. § 6672(a). The Court of Appeals found that Mr. Barnett's failure to pay the four quarters of taxes was "willful" because, following his April 12, 1982 ascension to the presidency of Anderson-Barnett, and prior to its filing for bankruptcy several months later, the company realized $492,101.12 in payments on receivables, which Barnett used to pay various corporate debts other than its liability to the IRS. "Once he became aware of the tax liability, Barnett had a duty to ensure that the taxes were paid before any payments were made to other

creditors," stated the Court. The "undisputed" evidence that he failed to do so "establish[es] willfullness as a matter of law." 20a, *infra. Slodov v. United States,* 436 U.S. 238, 254, 98 S.Ct. 1778, 1788 (1978), where this Court held that the failure of a person to pay withholding taxes out of after-acquired funds, was not a "willful" failure to pay under 28 U.S.C. § 6672(a), was distinguished with a finding that "Barnett was at all times a responsible person during the four quarters at issue. . . . " *See* 21a, *infra.* The Court then held that there is a duty to use *any* funds acquired by the company once the "withholding obligation becomes payable," and that "failure to do so when there is knowledge of liability" equates to willful conduct as a matter of law by one who has responsible person status "both before and after withholding tax liability accrues." *Id.*

Accordingly, the Fifth Circuit Court of Appeals rendered judgment against Barnett for $492,101.12 (the amount he "willfully" failed to pay), less the $2,582.24 already offset by the IRS, plus statutory interest and additions. The case was remanded for entry of judgment following the determination of the final judgment amount.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

26 U.S.C. § 6672 imposes liability on those persons who willfully fail to "collect, account for or pay over" employee withholding taxes. Although the statute does not use the term, courts commonly refer to persons possessing these duties as "responsible" persons. *United States v. Energy Resources, Inc.*, 495 U.S. 545, 546, 110 S.Ct. 2139, 2140 (1990); *Slodov v. United States, supra,* 436 U.S. at 246 n.7, 98 S.Ct. at 1784 n.7.

Courts have uniformly held, until now, that the question of whether a given person is "responsible" under § 6672 is one of fact, subject to review either under the clearly erroneous standard for a judge trial, or only for sufficiency of

evidence in the case of a jury trial. *See e.g., Kenagy v. United States*, 942 F.2d 459, 463 (8th Cir. 1991); *Donelon Phelps & Co., Inc. v. United States*, 876 F.2d 1373, 1374 n.2 (8th Cir. 1989); *Gustin v. United States*, 876 F.2d 485, 492 (5th Cir. 1989); *Wood v. United States*, 808 F.2d 411, 414 (5th Cir. 1987); *Sinder v. United States*, 655 F.2d 729, 731 (6th Cir. 1981), all holding that the district court's factual findings regarding responsible person status are reviewed under the "clearly erroneous" standard. *See e.g., Smith v. United States*, 894 F.2d 1549, 1553 (11th Cir. 1990), reviewing jury verdict for sufficiency of evidence; *McGlothin v. United States*, 720 F.2d 6, 9 (6th Cir. 1983), holding that the jury's resolution of the "responsible person" question would not be reversed on appeal where there was "conflicting evidence on this issue"; *Commercial National Bank of Dallas v. United States*, 665 F.2d 743, 752, 757 (5th Cir. 1982), finding the totality of facts presented a jury question on responsible person status, because facts "are critical in any § 6672 case"; *Fitzgibbons v. United States*, 522 F.2d 1353, 1354 (5th Cir. 1975), finding that the question of responsible status was "appropriate for the jury to resolve" because "each witness placed ultimate authority with the other;" *McCullough v. United States*, 462 F.2d 588, 590 (5th Cir. 1972), where jury verdict in favor of plaintiff on remand from reversal of directed verdict for the government was affirmed upon finding that it was supported by sufficient evidence. Indeed, even the Fifth Circuit herein stated that its past practice has been to treat "the issue of whether one is a 'responsible person' under § 6672 as essentially a question for the fact-finder. . . . " 11a, *infra.*

Given that the courts have viewed the issue of responsible status "as essentially a question of fact," no hard and fast legal rules have developed which automatically result in a finding that a given party is *ipso facto* responsible. While factors such as the holding of corporate office, authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees may be "indicia of responsibility," *George v. United States*, 819 F.2d 1008, 1011 (11th Cir. 1987), such factors have not been held, in the face of countervailing considerations, to be utterly dispositive. Even in

Hochstein v. United States, 900 F.2d 543 (2nd Cir. 1990), which held that the question of responsibility was "mixed" and therefore subject to plenary review, the court recognized that while "[courts] consider several factors in determining whether an individual is responsible for collecting and paying withholding taxes. . . . [t]he central question, however, is whether the individual has significant control over the enterprise's finances." 900 F.2d at 547. *See also Bauer v. United States,* 543 F.2d 142, 148 (Ct. Cl. 1976) ("This type of case is especially dependent upon its facts. Prior decisions are principally useful for comparison of their facts and to illustrate the type of facts which are ordinarily highlighted and emphasized.").

The Fifth Circuit in the instant case has adopted a new standard of review. Erroneously relying on *Hochstein* as authority for its novel approach, the court adopted a purely legal "multi-factor" analysis. Under this technique, a litmus test of facts which "will almost invariably prove dispositive of a finding of responsibility" (12a, *infra*) is applied rotely, without regard to those unique circumstances of a case which might militate against a finding of responsibility. The Fifth Circuit's token reference to the sufficiency of evidence standard of review enunciated in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969) (en banc), cannot disguise the real import of the court's decision, which is to substitute a "responsible person" fact-finding with a legal determination entirely dependent on the "multi-factor" test. Indeed, the Fifth Circuit admits that its "multi-factor" approach "narrowly constrains [the] fact-finder's role in a § 6672 case." 12a *infra.*[1]

In truth, the court's holding does not "narrowly constrain" the jury – it completely abrogates it. Any attempt by the jury to tailor its verdict to the particular circumstances

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[1] Perhaps the Fifth Circuit was forced to tinker with the standard of review because it could not find any error in the legal principles under which the jury decided the case. The instructions given were requested by the IRS (2 R 208), and no objection to this charge was made by either party. 7 R 77, 155.

before it will be found to be unsupported by sufficient evidence in the face of X number of litmus test factors suggestive of responsibility. Indeed, in response to petitioner's attempt to distinguish his case from those from which the litmus test factors were taken, the Fifth Circuit stated the following:

> We first observe that cases *not* finding § 6672 responsibility are relatively few and far between. Our research has revealed only three such cases decided by this court – only one of which has any possible relevance to the instant case – as contrasted with almost two dozen cases involving analogous fact patterns in which we have held that a party *was* a "responsible person."

16a, *infra* (italics in original). In other words, "we always find people responsible, so the particular facts of your case are of no consequence."

The Fifth Circuit's reduction of the question of responsible person status into a matter of law on the basis of its "multi-factor" analysis, under which X number of matches automatically equals a finding of responsibility, is not only *res nova*, but is also contrary to the approach taken by other courts which have confronted the question. The most recent such case is *United States v. Charlton*, ___ F.2d ___, 1993 WL 311941 (7th Cir. Aug. 17, 1993). On appeal from the district court's order affirming the bankruptcy court's decision holding him personally liable under 26 U.S.C. § 6672(a) for unpaid employment taxes, the plaintiff argued that the lower courts erred in finding him to be a "responsible party." He attempted to overcome this finding by arguing that the question of "responsible" party status was a question of law: "that questions of whether a given set of facts satisfies a given legal standard are subject to plenary review." 1993 WL 311941 at page 3. The Seventh Circuit rejected this argument, stating that "the legal significance of historical facts is itself a question of fact, and may not be overturned on appeal [in a bench trial] unless clearly erroneous." Thus, a court's determination of whether a taxpayer was a " 'responsible person' for purposes of section 6672 may not be overturned absent

clear error." *Id.*, citing *Gustin v. United States,* 876 F.2d 485, 491 (5th Cir. 1989).

The *Charlton* court went on to find that the lower court's decision was supported by sufficient evidence. In so doing, it rejected the mechanistic "multi-factor" approach adopted by the Fifth Circuit herein, and stated that the correct rule of law to be applied in determining whether a given person is "responsible" under § 6672 is "whether the taxpayer has 'significant control or authority over an enterprise's finances or general decision making.' " While noting that certain factors, such as the holding of office, the possession of an entrepreneurial stake, and the ability to sign checks, hire employees, and take out loans, are all "relevant factors" in resolving the question, the court was careful to state that these factors are not dispositive:

> The true objective of this inquiry, and the *sine qua non* of liability under section 6672, is a determination that the taxpayer had the authority to allocate funds to pay the company's other debts in preference to its debt to the IRS.

1993 WL 311941 at page 3.

Likewise, in *O'Connor v. United States,* 956 F.2d 48, 51 (4th Cir. 1992), the Fourth Circuit noted that while "[s]everal factors may indicate that a party is a responsible person under § 6672 . . . [t]he key element, however, is whether that person has the statutorily imposed duty to make the tax payments." The appellate court went on to reverse the trial court finding as a matter of law of "responsible status" by holding that despite plaintiff's check signing ability, title of vice president and fifty percent ownership, the evidence suggested that "the substance of the arrangement was that [his co-owner] exercised the authority to run the business. . . . " *Id.*[2]

The Fourth Circuit in *Turpin v. United States,* 970 F.2d 1344 (4th Cir. 1992), also rejected the approach adopted by the Fifth Circuit herein. There, the jury's exoneration of the

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[2] The Fifth Circuit erroneously cited *O'Connor* as support for its "multi-factor" approach. *See* 14a, *infra.*

plaintiff from liability under § 6672 was reversed by the trial court on motion for judgment notwithstanding the verdict. The appellate court reversed, finding that, under the "unusual circumstances of the case," the plaintiff was not liable. 970 F.2d at 1350.[3] This was so because of evidence that the plaintiff, "despite his official titles [corporate secretary, treasurer, and signatory to corporate checks], was little more than a functionary [for the company's real decision maker]." Despite the plaintiff's status and technical powers, the truth was that a subsidiary corporation "exercised complete control over the finances of [the company], including the payment of trust fund taxes," and that plaintiff's real responsibility was limited to "producing coal from a man" and distributing his payroll check to him. 970 F.2d at 1348.

Aside from being at odds with the rules of the other circuits, as well as its own previous rule, the Fifth Circuit decision adopting an intractable "multi-factor" test which determines responsibility under § 6672 in all cases as a matter of law warrants review by this Court because it sets bad precedent. First, the multi-factor test is not necessary. While the possibility of a jury's being unduly swayed by sympathy must certainly be guarded against, the Fifth Circuit's multi-factor approach is unnecessary to assure that the § 6672 penalty is dispassionately applied. A review of the case law reveals that only seldom do juries exonerate parties by finding them not responsible. In the event that a jury is misled by sympathy, F.R.C.P. 50 provides a court with sufficient power to correct such error.

Second, the multi-factor test also creates the possibility of significant evasion by providing a roadmap for artful dodgers. An enterprising person could engineer his own exoneration from responsibility by making sure he did not fall

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[3] At issue in this case was the factual question of whether the plaintiff's conduct was "willful," a question which the court called "the quintessential jury issue." 970 F.2d at 1350. However, there is no reason to believe the court would have treated an appeal of the question of "responsible" person status differently.

within any of the factors, a situation that a careful balancing of facts by the jury would avert.

Finally, there is no doubt that the Fifth Circuit's approach all but strips the jury of responsibility and leaves it no role in most, if not every, § 6672 case.[4] While it is true that "fabulous inflation cannot turn . . . conventional [questions] turning on appreciation of evidence into constitutional issues," *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455, 79 S.Ct. 921, 932 (1959), the Fifth Circuit's rule raises real Seventh Amendment concerns because it deprives the plaintiff of any meaningful trial by jury. *See Curtis v. Loether*, 415 U.S. 189, 195, 94 S.Ct. 1005, 1009 (1974) ("[W]hen Congress provides for the enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.").[5]

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[4] The only case in which a jury would be anything more than superfluous would be one in which there were factual disputes as to the existence of the various elements of the multiple factors. Since matters such as the taxpayer's job title, his entrepreneurial stake, and his check signing ability are almost invariably well-documented, and in fact uncontroverted, it will be a rare case indeed in which the presence of a jury is anything more than an unnecessary hinderance to a finding of liability.

[5] While it has been held that the granting of a judgment notwithstanding the verdict does not violate the Seventh Amendment's guarantee of trial by jury, *Neely v. Martin K. Eby Cons. Co.*, 386 U.S. 317, 321, 87 S.Ct. 1072, 1076 (1967), there can be no doubt that this rule is only true when the device is properly used, and not in cases where it is used to usurp the legitimate function of the jury. *See* F.R.C.P. 50(a), 1991 Comment (a) ("The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion of any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law.").

II.

While adopting the "responsible person" nomenclature used by the circuit courts to describe those individuals who might be found liable under 26 U.S.C. § 6672(a), this Court in *Slodov v. United States, supra,* expressly stated that it was not "necessarily adopting any of the constructions placed upon [that term] in the decisions." 436 U.S. at 245 n.7, 98 S.Ct. at 1784 n.7. This case calls upon this Court to resolve that pretermitted issue. While there are literally hundreds of district and circuit court decisions addressing the question of who is a "responsible person" under § 6672, there are almost as many different responses. However, the sweeping and expansive formulation adopted by the Fifth Circuit is not among the confusing, often conflicting, morass.

In construing the meaning of statutes, this Court begins with the words selected by the Congress. *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117, 111 S.Ct. 1156, 1163 (1991). 26 U.S.C. § 6671(b) defines the "person" who may be found liable under § 6672 as anyone who "is under a *duty* to perform the act in respect of which the violation occurs." (emphasis added). "Duty" is defined as "obligatory conduct or service" or "mandatory obligation to perform." *Black's Law Dictionary* (5th Ed. 1979). *See also Webster's Ninth New Collegiate Dictionary* (1985) ("obligatory tasks, conduct, service or functions that arise from one's position"). The use of the word "duty" in § 6672(b) is consistent with and underscores § 6672(a)'s focus on those persons "required" to collect and pay over withholding taxes.

"Duty" is separate and distinct from "authority." "Authority" is defined as "right to exercise powers" or "permission." *Black's, supra. See also Webster's, supra,* ("power to influence or command thought, opinion, or behavior"). "The notion of duty implies an affirmative obligation to perform specific acts, whereas authority is by its nature discretionary." *In re Premo,* 116 B.R. 515, 525 (E.D. Mich. 1990). "Duty" encompasses "authority," but they are not synonymous. One may have the "authority" to act, but not the "duty." Thus, a "high level corporate officer" may "have the

authority to command that any number of actions be taken, but that does not mean that he or she is obligated or required to do so." *Id.* He or she may, or may not, have a "duty."

The Fifth Circuit's "multi-factor" test is not designed to determine who has the "duty" to collect, account, or pay over withholding taxes. The factors of the test (corporate status, ownership interest, check signing ability, day-to-day managerial powers, etc.) all speak to the question of "authority," not "duty." As the Fifth Circuit itself stated in the penultimate declaration of its legal discourse:

> The crucial inquiry is whether a party such as Barnett, **by virtue of his position** in (or vis-a-vis) the company, **could have had "substantial" input** into such decision, had he wished to exert his authority.

13a-14a. Under this test, mere power, even if not total, becomes the linchpin of liability.

It is hardly surprising that no authority is cited for this interpretation of § 6672(a). Not only is this explication at odds with the wording of the statute, but is also far beyond the limits to which the courts have gone before. Most courts, including the Fifth Circuit, have heretofore stated that in order to be "responsible" under § 6672, one must have the status, duty *and* authority to make corporate decisions or to handle corporate tax collection or payment matters. *See e.g., Raba v. United States,* 977 F.2d 941, 943 (5th Cir. 1992); *Morgan v. United States,* 937 F.2d 281, 284 (5th Cir. 1991); *Kenagy v. United States, supra,* 942 F.2d at 464, 465, *citing Godfrey v. United States*, 748 F.2d 1568, 1574 (Fed. Cir. 1984); *Thibodeau v. United States,* 828 F.2d 1499, 1503 (11th Cir. 1987); *Wood v. United States, supra,* 808 F.2d at 415, *citing Howard v. United States*, 711 F.2d 729, 734 (5th Cir. 1983); *Mazo v. United States,* 591 F.2d 1151, 1156 (5th Cir. 1979), *cert. denied, sub nom. Lattimore v. U.S.*, 444 U.S. 842 100 S.Ct. 82 (1979); *Neckles v. United States*, 579 F.2d 938, 940, 948 (5th Cir. 1978). *But see Brounstein v. United States*, 979 F.2d 952, 954 (3rd Cir. 1992); *Quattrone Accountants, Inc. v. IRS,* 895 F.2d 921 (3rd Cir. 1990); *Ruth v. United States*, 823 F.2d 1091, 1094 (7th Cir. 1987), stating that

responsibility is a matter of status, duty *or* authority. As one court observed, "[t]he statute is directed at the person charged with the duty of collecting and paying the taxes and not simply one who may have authority to do so." *Wiggins v. United States,* 188 F. Supp. 374, 376 (E.D. Tenn. 1960). *See also In re Premo, supra,* 116 B.R. at 525 ("To equate authority (the power or right to exercise control) with duty, as the IRS would have us do, would expand the scope of ss 6672 and 6671 in a manner which appears unwarranted by the language of these provisions.").

This is not to suggest that all the cases have been consistent. Indeed, the standard for liability under § 6672 has been like a virus, constantly mutating into stronger strains. For example, the conjunctive "and" in *Mazo v. United States, supra,* which held that liability was a function of status, duty, *and* authority, was quoted as "or" in *Quattrone Accountants, Inc. v. IRS, supra,* at 927, which then gave birth to an entire line of cases using the disjunctive "or." Likewise, a second significant metamorphosis in the standard of liability resulted from a misquotation of *Howard v. United States, supra,* in *Turnbull v. United States,* 929 F.2d 178 (5th Cir. 1991). In *Howard,* the court stated that one must have the requisite status, duty *and* authority to be liable, and defined "authority" as "effective power to pay." 711 F.2d at 734. *Turnbull* repeated the "status, duty *and* authority" canon, but then declared that the "crucial inquiry" in determining liability is "effective power to pay," an element which *Howard* had limited to assessment of "authority" alone. 929 F.2d at 178. The *Turnbull* formulation then became precedent. *See e.g., Raba v. United States, supra,* 977 F.2d at 943, *citing Gustin v. United States, supra,* 876 F.2d at 491, *citing Turnbull.*

However, despite these transfigurations of the touchstone of "responsibility" under § 6672, the courts have not yet gone as far as the Fifth Circuit herein. Barnett was found responsible" solely because he (1) was a stockholder; (2) was a director; (3) was vice president; (4) was responsible for day-to-day operations (presumably of the drilling operations, because the testimony was undisputed that Mr. Barnett did not have *any,* much less "day-to-day," authority over fiscal matters); (5) made recommendations as to

which creditors to pay (although the testimony was undisputed that the decision as to which creditors to pay was exclusively Mr. Anderson's); and (6) had check-signing capability. The court concluded that, on the basis of Barnett's status and title, he had the power to have substantial input into the decision as to whether the taxes should be paid, thus making him "responsible." 13a-14a, *infra*.

However, the Fifth Circuit's conclusion is a *non sequitur*. Access to corporate funds, even when accompanied by the ability to sign corporate checks, does not make one a "responsible" party. *Kenagy v. United States, supra,* 942 F.2d at 464, 465, citing *Howard v. United States, supra,* 711 F.2d at 734. *See also O'Connor v. United States, supra,* 956 F.2d at 51 (" 'The mechanical duty of signing checks . . . [is] not determinative of liability under § 6672.' "). "A corporation may deny an employee the actual authority to pay taxes. In that circumstance, requiring the employee to pay taxes would amount to requiring him to steal company funds." *Gustin v. United States, supra,* 876 F.2d at 492; *Morgan v. United States, supra,* 937 F.2d at 284.

Perhaps for this reason, "[t]he overwhelming weight of case precedent requires the factfinder to look through the 'mechanical functions of the various corporate officers' to determine the persons who have 'the power to control the decision-making process by which the employer allocates funds to other creditors in preference to its withholding tax obligations.' " *Godfrey v. United States,* 748 F.2d 1568, 1576 (Fed. Cir. 1984), quoting *Haffa v. United States,* 516 F.2d 931, 936 (7th Cir. 1975). This is the person with the "duty." *See O'Connor v. United States, supra,* 956 F.2d at 51; *Monday v. United States,* 421 F.2d 1210, 1214 (7th Cir. 1970).

"[T]he test of liability under § 6672 is a functional one . . . We are concerned with actual control and economic reality, not paper facades." *Commercial National Bank of Dallas v. United States,* 665 F.2d 743, 752 (5th Cir. 1982). "The focus must be on substance rather than form." *O'Connor v. United States, supra,* 956 at 51. *See also Dudly v. United States,* 428 F.2d 1196, 1201 (9th Cir. 1970) ("Although

[plaintiff] retained the title of corporation president during the period in question, the holding of corporate office does not, *per se*, impose liability upon the officeholder."). *But see United States v. Burger*, 717 F. Supp. 245, 248 (S.D.N.Y. 1989), citing *Kalb v. United States*, 505 F.2d 506 (2d Cir. 1974), *cert. denied*, 421 U.S. 979, 95 S.Ct. 1981 (1975) ("clear titular authority is generally sufficient"). *See also McCray v. United States*, 910 F.2d 1289, 1290 (5th Cir. 1990), *cert denied, sub nom. Scott v. U.S.*, ___ U.S. ___, 111 S.Ct. 1313 (1991) (plaintiff found to be responsible solely on basis of status as chairman of board and vice president); *Smith v. United States, supra*, 894 F.2d at 1553 (11th Cir. 1990) (plaintiff found responsible as a matter of law because he was president, controlling shareholder, and co-manager).

Had the Fifth Circuit focused on "substance" instead of mere status, it could only have found that Barnett was not responsible. The undisputed evidence from every witness who testified at trial established that Mr. Barnett was only responsible for the day-to-day functions of the operational side of the business; he had no responsibility whatsoever for any of the "financial" end of the business. Every single witness who testified at trial, including four of the five shareholders of Anderson-Barnett Drilling Company, a financial consultant hired by the company, two high level "operations" employees, and the secretary, unequivocally affirmed this fact. *See* 5 R 48; 5 R 95-96; 6 R 7-8; 6 R 19; 6 R 33, 37; 6 R 72; 6 R 99; 6 R 154; 7 R 37. Mr. Barnett was no more responsible for the "day-to-day operations" of Anderson-Barnett Drilling Company than is a Chief of Surgery, Nursing or even Staff responsible for the "day-to-day operations" of an entire hospital, including its accounting department.

While Mr. Barnett was given check-signing capability, it was never contemplated that he would be the person "responsible" for signing checks. In the initial days of Anderson-Barnett Drilling Company, the investors expected rapid expansion, and believed that Charles Anderson, as President of the company, would be away from the office on occasion either arranging financing or securing new business. To cover that contingency, both Mr. Barnett and James Harrington, the

company's Secretary-Treasurer, were made permissible but not necessary signatories to the company's accounts so that someone could sign checks when Mr. Anderson was unavailable. 6 R 161. Indeed, the only time Mr. Barnett ever signed payroll checks was on one occasion when Mr. Anderson was out of town. 6 R 136. *See Turpin v. United States, supra,* 970 F.2d at 1348-49 n.5 (court discounted importance of the plaintiff's signing 17 corporate checks because the evidence established that he only did so "as matter of convenience when [the corporation's president] was not available.").

Additionally, the panel viewed Barnett's "responsible person" status as being proved by the fact that he "possessed enough authority over corporate affairs to independently investigate Anderson and ultimately force him out." *See* 15a, *infra.* This conclusion is belied by the facts. Mr. Barnett never conducted an "independent" investigation. A vote of the majority of the shareholders and directors empowered him to investigate Mr. Anderson's financial management. 5 R 63-64. 6 R 157-58. Prior to that vote, he had been repeatedly denied access to the corporate books and records. 5 R 59, 80; 6 R 123, 125. *See also* 6a, *infra.* ("Anderson . . . refused to provide Barnett with the financial information he requested."). In fact, as the district court stated, Anderson "hid" his malefaction from all concerned. 40a, *infra.* As the district court viewed it, Anderson "almost commit[ed] a fraud upon the rest of the stockholders" (41a, *infra*), a type of fraud that he was well equipped to perpetrate given his CPA training and unbridled authority.

All of this probative evidence was totally ignored by the Fifth Circuit because it was not relevant to its legal test for responsibility. Status and power, without any obligation or duty, makes a person liable under § 6672. This is so because, according to the court, it is not legally possible to escape liability by "delegating" the responsibility to another person. 13a, *infra, citing Gustin v. United States, supra,* 876 F.2d at 491 ("One does not cease to be a responsible person merely by delegating that responsibility to others. . . . "). It is certainly true that there may be more than one "responsible person" under § 6672 in a company, and *Gustin* certainly

correctly held that one cannot divorce him or herself from responsibility under § 6672 by "delegating" the duty to another. But courts have not found, until now, that the corporation itself is incapable of allocating and apportioning various duties to various corporate officials, as is the case here. To the contrary, "[t]he separation of authority within a business enterprise, and the limitation on authority held by officers is a practical reality which is acknowledged and given effect by the courts." *Godfrey v. United States, supra,* 748 F.2d at 1576. *See also Bauer v. United States, supra,* 543 F.2d at 149 ("The courts recognize the normal division of and limitations on authority exercised by various representatives of a particular business. . . . "). To ignore this reality and rule otherwise would be to envelop within "responsible person" status all significant investors with titles in corporations which fail to pay their withholding taxes. *See O'Connor v. United States, supra,* 956 F.2d at 51-52.

The courts have resisted such overreaching. They, unlike the Fifth Circuit herein, have recognized that there are situations where despite raw power, corporate officials, for various reasons, do not have responsibility, duty, or obligation with regard to the payment of withholding taxes. These courts have understood that one may be a "high level" official in a company with responsibilities limited to certain areas that do not necessarily encompass power or sovereignity over fiscal matters including the payment of taxes. *See e.g., Turpin v. United States, supra,* 970 F.2d 1348 (court recognized that the secretary/treasurer of a company might, despite his title, have job responsibilities limited to operational aspects of a company and no real dominion over corporate finances); *Kenagy v. United States, supra,* 942 F.2d 459 (question of whether plaintiff was "responsible" person turned upon testimony that someone else in company was in control, even though "paper evidence" suggested that plaintiff had the status (office manager and check writer), authority (authorized signatory and borrower, actual bill payer), and duty (tax payment remitter) to avoid payroll tax payment default); *Godfrey v. United States, supra,* 748 F.2d at 1576 (finding of responsibility reversed because even though the plaintiff was chairman of

the board and may have had the "ultimate authority" over financial matters of the corporation, there was no evidence that he "exercised control of the collection, accounting for, and payment over of taxes"); *Maggy v. United States,* 560 F.2d 1372, 1374-75 (9th Cir. 1977), *cert. denied,* 439 U.S. 821, 99 S.Ct. 86 (1978) (board chairman and signatory was not responsible because he was "kept isolated from the [Board's financial] committee's activities and decisions"); *Bauer v. United States, supra,* 543 F.2d at 149 (substantial shareholder, vice-president, and director, who was head of corporation's photo finishing division, not responsible because he was "an outsider" with respect to financial and fiscal affairs); *United States v. Burger, supra,* 717 F.Supp. at 249 (court found that plaintiff was not responsible even though he participated in day-to-day operation of company because he "was excluded from significant control over most aspects" of the corporation's financial affairs); *Cassis v. United States,* 86-2 U.S. Tax Cas. (CCH) ¶ 9800 (S.D. Ohio 1986) (50% shareholder, director, and officer not responsible because his role in financial affairs in fact was "de minimis"); *Abramson v. United States,* 85-1 U.S. Tax Cas. (CCH) ¶ 9380, (E.D.N.Y 1985) (30% shareholder, secretary/treasurer, board member and signatory not responsible because not involved in corporation's finances, but mainly handled sales); *Bernardi v. United States,* 74-1 U.S. Tax Cas. (C.C.H.) ¶ 9170 (N.D. Ill.), *aff'd,* 507 F.2d 682 (7th Cir. 1974), *cert. denied,* 422 U.S. 1042, 95 S.Ct. 2656 (1975) (minority shareholder, vice president, director, and signatory not a responsible person because he truly did not participate in decision making about disbursements or other financial matters); *In re Brahm,* 85-2 U.S. Tax Cas. (CCH) ¶ 9708 (M.D. Bankr. Fla. 1985) (president and signatory not responsible because merely a figurehead).

There is simply no way to reconcile the Fifth Circuit's decision in this case with the language of 26 U.S.C. § 6672, or with the majority of cases interpreting it. Rather than announcing and applying a test for "responsibility," the court has ignored the question of duty, and captured under the statute an individual with an undisputed lack of obligation and real effective authority with regard to fiscal matters under

the theory that because he had the status and power to exert influence, he *should have had* responsibility. Almost as if recognizing that its holding stretches § 6672 beyond boundaries to which it has not been taken before, the court attempts to justify its approach on the grounds that holding persons who *should be* responsible liable under § 6672 will serve a "valuable prophylactic purpose" by encouraging "officers, directors, and other high-level employees to stay abreast of the company's withholding and payment of employee's taxes" and to force "high-level company officials" to "monitor" their company's finances. 18a, *infra*. However, such matters are addressed to Congress, not the courts. The wording of § 6672 leaves little room for the courts to second guess the policy choice already made by Congress. Indeed, there are many things Congress could have done to make § 6672 more valuable to the IRS, and easier to enforce, but chose not to incorporate into the statute. For example:

> Congress could have charged each principal officer of the corporation with personal responsibility for willful failure to pay withholding taxes. It is doubtful whether such an obligation would have been to [sic] harsh since service as a corporate officer is not compulsory. Certainly, enforcement would have been much simpler and easier. But Congress did not so enact. **Instead, the statute predicates liability upon any person as officer, employee, or member who is under a *duty* to make payment and willfully fails to do so.**

Sherwood v. United States, 246 F. Supp. 502, 508 (E.D.N.Y. 1965) (emphasis added).

In any event, the policy which the court seeks to promote is little served by holding liable one who was intentionally deceived by a deliberate hiding of the failure to pay taxes. Since Anderson refused all requests for financial records, nothing short of hiring his own CPA to "audit" the company's books could have kept Barnett more abreast than he was. Is that what § 6672 requires – that fear of liability should

compel a vice president whose only expertise is in engineering to be inherently suspicious of his company's Chief Financial Officer who is a CPA, to distrust the CPA's representations concerning the company's financial position, and secure the services of an independent investigator to guarantee against the possibility of being held a "responsible party" as a matter of law? Surely Congress did not intend § 6672 to have such a "prophylactic purpose."

III.

The Fifth Circuit found that Barnett's failure to collect, account for, and pay over the withholding taxes that Anderson misspent was "willful" as a matter of law because he subsequently used funds acquired by Anderson-Barnett from sources other than employee withholding (which had long been depleted by Anderson) to pay other corporate debts in an effort to survive. A finding of willfullness as a matter of law was necessary because no reasonable person could conclude that Barnett's conduct was willful as a matter of fact – the uncontradicted testimony established that at the time the taxes were due, Barnett was totally unaware of Anderson's tax evasion, an ignorance which was reasonable under the circumstances.[6] While the rule embraced by the Fifth Circuit has been popular with the circuit courts, presumably because it dispenses with the unpleasantness of having to prove willfullness as a matter of fact and offers the courts one more device by which to "narrowly constrain" the factfinder, the rule is contrary to the language of 26 U.S.C. § 6672(a) as already interpreted by this Court in *Slodov v. United States, supra.*

Slodov found that "6672 cannot be read as imposing upon the responsible person an absolute duty to 'pay over' amounts which should have been collected and withheld" out of funds which are acquired after the trust fund created by the withholding has been dissipated ("after-acquired funds"). 436

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[6] " 'Willfulness' has been almost universally defined as an intentional voluntary, conscious act or omission." *Feist v. United States*, 607 F.2d 954, 961 (Ct. Cl. 1979).

U.S. at 254, 98 S.Ct. at 1788. In the context of the facts of the case, this resulted in a holding that "a responsible person . . . does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time he assumed control there are no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute." 436 U.S. at 259, 98 S.Ct. at 1791.

Slodov has not found favor in the circuit courts. In *Mazo v. United States, supra*, the Fifth Circuit limited *Slodov* to its narrowest facts, situations where there is a change in "control of," which the courts have equated with "responsibility for," a business.[7] Relying on the pre-*Slodov* cases of *Maggy v. United States, supra,* and *Teel v. United States,* 529 F.2d 903 (9th Cir. 1976), the court held that, despite *Slodov,* a responsible person's conduct becomes willful if he or she knowingly uses after-acquired funds to satisfy debts other than taxes, so long as he or she was responsible "both before and after withholding tax liability accrued." 591 F.2d at 1154. In other words, a responsible person's failure to collect, account for, or pay over withholding taxes whose conduct was not *willful* due to a reasonable lack of knowledge, retroactively becomes *willful* when he or she subsequently uses after-acquired funds to satisfy other corporate indebtedness. The ease of securing convictions under the *Mazo* rule has proved extremely popular, having been adopted in every circuit that has considered the matter. Quick on the heels of *Mazo* came *Kizzier v. United States,* 598 F.2d 1128, 1133 (8th Cir. 1979), which blindly followed *Mazo* without much discussion, then *Garsky v. United States,* 600 F.2d 86, 90 (7th Cir. 1979). By then, the ball was rolling. *See Davis v. United States*, 961 F.2d 867, 872

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[7] While this Court spoke of instances of change in "control," nowhere in its opinion did it equate "control" with "responsibility" under § 6672. One element of "control" must be knowledge. Thus, a corporate official without knowledge that taxes are not being paid can be said to be out of control of fiscal matters, even though he or she may be responsible for them.

(9th Cir. 1992); *Vespe v. United States,* 868 F.2d 1328, 1335 (3rd Cir. 1989); *Thibodeau v. United States, supra,* 828 F.2d at 1506. Now, courts confronted with a *Slodov* defense usually simply find that the charged person was responsible both before and after the tax liability accrued, enabling them to find "willfullness" as a matter in law in almost every case. The Fifth Circuit herein simply followed this trend.

With all due respect to the unanimity of the circuits, *Slodov* has been too narrowly interpreted. While the facts of that case involved a change in control of the business at issue, the rationale of the case applies equally well to situations where trust funds are entirely dissipated during the time a person is responsible but not willfully so because of a reasonable lack of knowledge. Once he or she gains knowledge, and thus subsequent conduct becomes "willful," the use of after-acquired funds (which are not subject to the trust) to pay other corporate debts does not violate § 6672.

This broader view of *Slodov* is supported by this Court's interpretation of § 6672.

> Section 6672 cannot be read as imposing upon the reasonable person an absolute duty to "pay over" amounts which should have been collected and withheld. The fact that the provision imposes a "penalty" and is violated only by a "willful failure" is itself strong evidence that it was not intended to impose liability without personal fault. Congress, moreover, has not made corporate officers personally liable for the corporation's tax obligations generally, and § 6672 therefore should be construed in a way which respects that policy choice. The Government's concession – that § 6672 does not impose a duty on the responsible officer to use personal funds or even to liquidate corporate assets to satisfy the tax obligations – recognizes that the "pay over" requirement does not impose an absolute duty on the responsible person to pay back taxes.

436 U.S. at 255, 98 S.Ct. at 1789. This interpretation of the statute finds support not only in the express language of the

statute, which uses the words "pay over" instead of simply "pay,"[8] but also in the legislative history.

> Nothing whatever in § 6672 or its legislative history suggests that the effect of the requirement to "pay over" was to impress a trust on the corporation's after-acquired cash, however. Moreover, the history of a related section, 26 U.S.C. § 7501, makes clear that it was not.

Id.[9]

The Fifth Circuit's holding Barnett responsible as a matter of law because he failed to use after-acquired funds to satisfy Anderson-Barnett's tax liability cannot be reconciled with *Slodov's* interpretation of § 6672. Had Barnett been both responsible and willful at the time Anderson defaulted on the withholding taxes, his liability would be clear. *Slodov, supra,* 436 U.S. at 245-46, 98 S.Ct. 1784 ("When the same individual or individuals who caused the delinquency in any tax quarter [willfulness] are also the 'responsible persons' at the time the Government's efforts to collect from the employer have failed [responsibility] . . . , there is no question that § 6672 is applicable to them."). However, by holding that the subsequent failure to use after-acquired funds to pay withholding taxes is *de facto* proof as a matter of law that a responsible person's initial failure to collect or pay over the tax was willful, the courts have effectively made a responsible person's use of after-acquired funds to satisfy other corporate indebtedness a grounds for liability under § 6672. This is impossible to reconcile with this Court's "reject[ion]

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[8] "It is quite clear that failure to 'pay over' third party taxes is substantively different from failure to pay taxes." *United States v. Musacchia,* 900 F.2d 493, 500 (2d Cir. 1990), *cert. denied,* 493 ___ U.S. ___, 111 S.Ct 2887 (1991) *vacated in part on other grounds,* 955 F.2d 3 (2nd Cir. 1991).

[9] For legislative history, this Court turned to the report of the Senate and House Committees, which stated that "the application of the penalty is limited only to the collected and withheld taxes. . . ." 436 U.S. at 249 n. 12, 98 S.Ct. at 1786 n.12.

of the argument that . . . § 6672 can be construed as establishing a fiduciary obligation to pay over after-acquired cash unrelated to the withholding taxes." 436 U.S. at 256-57, 98 S.Ct. at 1789.

Moreover, the Fifth Circuit's holding, while easing the government's burden of proof, is counterproductive in the long term, as this Court recognized in *Slodov*. Faced with the option of expending after-acquired funds in an effort to keep the company afloat, which will automatically trigger liability under § 6672, or simply declaring bankruptcy, no rational corporate official who discovers that, through no fault of his or hers, withholding taxes have not been paid would elect the former option. No "well counseled person" would assume management of the company in such a situation. 436 U.S. at 253-54, 98 S.Ct. at 1788. Thus, the holding of responsible persons liable under § 6672 merely for their use of after-acquired funds discourages continued operations (which in most cases is the only real hope for recouping the trust) "without encouraging employer compliance with tax obligations or facilitating collection of back taxes." *Id.*

Petitioner is not alone in his reading of *Slodov*. Judge Greene of the United States District Court for the District of Utah was confronted with a factual situation identical to that presented by this case – a corporate official who, while responsible, was totally and reasonably unaware that withholding tax trust funds had been dissipated, and who thereafter used after-acquired funds to continue operations before satisfying tax liability. *See Johnson v. United States*, 663 F. Supp. 294 (D. Utah 1987). The judge bravely rejected the *Mazo* line of cases that limit *Slodov* to its narrow facts. First, he analyzed the underpinnings of this Court's opinion:

> The Supreme Court based its view that a responsible person does not act "willfully" when paying the corporation's creditors with after-acquired cash on the following grounds: (1) it is inconsistent with the statute to impose penalties on a taxpayer for doing what is in the best interest of the IRS – continuing

> to operate the business; otherwise, all well counseled responsible persons would cease doing business rather than expose themselves to penalties; (2) there is no equitable trust imposed on after-acquired cash because there is no nexus between such current cash and the misappropriated withholdings; (3) the penalty statute was not intended to be used to pay the IRS ahead of creditors to which the IRS was expressly made subordinate by Congress; and (4) Congress intended to impose penalties only upon a showing of personal fault.

663 F. Supp. 298. Applying these precepts to the facts before him, he found that *Slodov* controlled:

> Here, as in *Slodov*, the taxpayer was innocent with regard to the original failure to collect, account for, and pay over taxes. Here, as in *Slodov*, the taxpayer if well counseled would recognize that once he or she was knowledgeable of the dissipated withholdings, there can be no penalty if the choice is made to discontinue operations. Here, as in *Slodov*, there is no nexus between the dissipated withholdings and the after-acquired cash. Finally, here as in *Slodov* there is no showing of personal fault.

663 F. Supp. at 298-299.

Every one of Judge Greene's observations apply to the instant case. The Fifth Circuit's holding that Barnett acted willfully as a matter of law is totally contrary to the Congressional intent manifested in § 6672(a) as interpreted and applied by this Court in *Slodov*.

CONCLUSION

For the above and foregoing reasons, petitioner Richard D. Barnett respectfully petitions to grant certiorari in this case.

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APPENDIX

Richard D. Barnett,
Plaintiff-Appellee,

v.

INTERNAL REVENUE SERVICE,
Defendant-Appellant.

No. 92-4733.

United States Court of Appeals,
Fifth Circuit.

April 28, 1993.

Sara S. Holderness, Gary R. Allen, Chief Trial Atty., Charles E. Brookhart, Neal I. Fowler, Trial Atty., Dept. of Justice, Appellate Section, Tax Div., Washington, DC, for defendant-appellant.

Warren D. Rush, Rush & Rush, Lafayette, LA, for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before KING and EMILIO M. GARZA, Circuit Judges, and COBB, District Judge.*

KING, Circuit Judge:

The Internal Revenue Service appeals from the judgment of the district court denying its motion for judgment as a matter of law on the issue of Richard D. Barnett's liability under 26 U.S.C. § 6672(a). Because we conclude that the district court erred in denying the

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* District Judge of the Eastern District of Texas, sitting by designation.

motion, we reverse and remand the action for further proceedings consistent with this opinion.

I.

The facts of this case relevant to our disposition of the primary legal issues are derived almost exclusively from the testimony offered by the plaintiff-appellee, Richard Barnett, and his witnesses at trial. In 1980, Barnett and Charles Anderson formed Anderson-Barnett Drilling Company, Inc. (the Company), to provide drilling services for oil and gas companies in southern Louisiana. Barnett and Anderson each retained twenty percent of the Company's stock, and the balance was sold to other investors recruited by Anderson. The Company's shareholders, including Barnett and Anderson, served as it directors. Barnett initially also served as vice-president of the Company. Anderson served as president and chief financial officer until March 1982, when Barnett succeeded him as president.

The Company maintained two offices, one in Lafayette, Louisiana, and the other in Lake Charles, Louisiana. Barnett ran the Company's field operations from the Lafayette office. His primary responsibility was directing the day-to-day operations of the Company's drilling rigs. In this capacity, he handled operational problems, purchased supplies, and hired, fired, and supervised the field personnel. He also did "sales" work – contacting potential customers, bidding on jobs, and negotiating drilling contracts. Anderson, a certified public accountant, took care of the Company's bookkeeping and financial affairs at the Lake Charles office. His

responsibilities included maintaining the Company's financial books and records, filing tax returns, supervising the payroll, and paying creditors.

According to Anderson and Barnett's testimony, the two men also shared certain responsibilities. Barnett would review bills sent to the Company by creditors and occasionally make recommendations to Anderson regarding whether certain creditors should be paid.[1] Anderson testified, however, that he had the "final word" about the payment of creditors. Barnett and Anderson also conferred about major business decisions affecting the finances of the Company, including the acquisition and financing of new equipment. With respect to such business decisions, Anderson did not have the "final word"; rather, decisions were mutual.[2] On at least one occasion,

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[1] Q. . . . [W]here were invoices of [the Company] processed?
A. [Anderson:] Now, by invoices, what do you mean?
Q. Well, you know, invoices to the company?
A. To the company. Normally they come into Lafayette and then were sent over to Lake Charles.
Q. So, again, I ask you, prior to March 31 of '82, where were the invoices [of the Company] processed?
A. Well, they were processed in both places. They were approved in Lafayette and then were paid out of Lake Charles.

Barnett himself testified that on occasion he would call Anderson and request that payment for particular creditors be expedited – "I'd call Mr. Anderson and say, 'Consider trying to get these guys paid.' "

[2] Q. Did ya'll [Barnett and Anderson] have discussions regarding the direction of the corporation and the finances of the corporation?

Barnett himself successfully negotiated a loan with the First Bank of Lafayette for the purchase of equipment.

The Company maintained three checking accounts – two in lake Charles and one in Lafayette. The Lake Charles accounts were used for payroll and for general operating expenses. The Lafayette account was used primarily to purchase supplies for the Company's rigs. The checkbook for the latter account was maintained by Barnett at the Lafayette office. Barnett was authorized to sign checks, without Anderson's permission, and he did so on numerous occasions. Although the checkbooks for the other two accounts were kept at the Lake Charles office, it is undisputed that Barnett was authorized to sign checks drawn on both accounts and, again, could do so *without Anderson's permission*. On at least one occasion prior to

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A. [Anderson:] Some, to a degree.
Q. When you were deciding to make purchases or borrow money, did you discuss that with Mr. Barnett or did you do that on your own?
A. That was discussed.
Q. With any major financial decision of the corporation, did you decide that on your own or did you discuss that with Mr. Barnett?
A. So far as financing the equipment and so on?
Q. Financing new equipment.
A. That was discussed. . . . [Decisions] w[ere] mutual.

* * *

Q. So when he was – opposing counsel was asking you earlier about making financial decisions, you were mainly talking about you hav[ing] exclusive control over the bookkeeping function of the corporation; is that correct?
A. That's correct.

taking over as president in March 1982, Barnett signed payroll checks when Anderson was out of town. After he became president, Barnett signed checks drawn on this account to pay employees as well as outside creditors.

Barnett testified that, despite his central role in the day-to-day business operations of the Company, his knowledge of its financial affairs was limited. For the most part, he simply allowed Anderson to run the financial side of the business. Moreover, because Barnett made only infrequent trips to the Lake Charles office, he had limited access to the Company's financial records until he took over as president in March 1982. When Barnett, in his capacity as vice president, did request "financial updates" from Anderson, he was "assured" that "everything was going all right." It is unmistakable from his testimony, however, that Barnett believed, by virtue of his position in the Company, that he had a right to know the financial condition of the business.[3] Barnett simply was so busy with the day-to-day business of the Company that he relied on Anderson's oral assurances: "I was more than convinced [that the financial affairs of the Company were extremely sound.] Charlie's assurances were very believable."

In 1981, the Company began experiencing financial difficulties. By early 1982, the Company's cash flow was drying up; creditors complained and checks were being returned for insufficient funds. In response to these problems, Barnett, still acting as vice president, met with

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[3] As he testified, "[a]s Mr. Anderson mentioned earlier, I asked him, on what I remember as a monthly basis to give me . . . a financial update on the [the Company]."

creditors in an effort to restructure the financing of the Company's rigs. He also hired an accountant, Dorothy Level, to help him examine the Company's financial records. Anderson, however, refused to provide Barnett with the financial information he requested.

In March 1982, Barnett organized a directors meeting. At this meeting, Anderson resigned as president, and Barnett took his place. After a review of the Company's financial records revealed that Anderson had not been paying over taxes withheld from employees' paychecks to the United States, Barnett confronted Anderson, who denied that the taxes had not been paid. On April 12, 1982, however, Anderson confessed to Barnett and the other stockholders that the withheld taxes had indeed not been paid.

Significant deposits were made into the Company's Lafayette checking account after April 12, 1982, the date when Barnett first became aware that Anderson had not paid over the taxes. On April 13, the Company received a $375,000 payment from a customer, which was immediately offset by the depository bank to satisfy an outstanding loan. In the following weeks, however, other deposits, which were not offset, totalled $492,101.12. None of these funds were ever used to pay the Company's accrued withholding tax liability, which by the end of the first quarter of 1982 was $604,509.91. Instead, Barnett wrote checks for the payroll and to pay others, including a check for $72,590.68, made payable to himself, and a check for $20,000, made payable to cash. Several months later, the Company filed for bankruptcy.

In accordance with 26 U.S.C. § 6672(a), the Internal Revenue Service (IRS) assessed Barnett and Anderson $604,509.91, which represented a one-hundred percent penalty for the Company's unpaid withholding taxes for the second, third, and fourth quarters of 1981 and the first quarter of 1982. Barnett paid $200 in partial satisfaction of the assessment, and the IRS applied credits of $2,382.24. When Barnett's claim for a refund was denied, he filed this refund suit in the district court. The IRS filed a counterclaim seeking recovery of the balance of the assessment, $600,623.67, plus statutory interest and additions. The IRS also joined Anderson as a third party defendant. On December 17, 1990, the district court granted summary judgment in favor of the IRS with respect to its claims against Anderson.

Barnett's case was tried before a jury in February 1992. At the close of the evidence, the IRS moved for judgment as a matter of law[4] on the issue of Barnett's § 6672(a) liability. The district court denied the motion and submitted to the jury instructions essentially tracking the elements of § 6672(a), asking whether Barnett was a "responsible person" in the Company who "willfully" failed to pay over withholding taxes.[5] The jury found that

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[4] The December 1, 1991 amendment to Rule 50 of the Federal Rules of Civil Procedure abandons the familiar terms "directed verdict" and "judgment notwithstanding the verdict" in favor of a single term "judgment as a matter of law." *See* Fed.R.Civ.P. 50.

[5] Section 6672(a) provides, in pertinent part:

> (a) *General Rule.* Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or

Barnett was not a "responsible person" for purposes of the statute and, therefore, never reached the issue of whether Barnett had willfully failed to pay the taxes.

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the IRS filed a renewed motion for judgment as a matter of law or, in the alternative, for a new trial. The district court denied the motion, observing that it agreed with the jury's verdict because, under the circumstances, it was "just not fair" to hold Barnett liable. The court reasoned that Anderson was "the responsible party" because "he hid everything from everybody else" and "he was totally in control." This appeal ensued.

II.

In reviewing the disposition of the IRS's post-verdict motion for judgment as a matter of law, we apply the same standard applied by the district court. *Normand v. Research Institute of America, Inc.*, 927 F.2d 857, 859 (5th Cir. 1991). We consider all of the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion. *See Boeing Co. v. Shipman*, 411 F.2d

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> truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). The Code defines "person" to include "an officer or employee of a corporation, or a member or employee of a partnership who, as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671(b).

365, 374 (5th Cir. 1969) (en banc). If the facts and the inferences point so strongly and overwhelmingly in favor of one party that we believe that reasonable jurors could not arrive at a contrary verdict, then the motion should have been granted. *See id.* On the other hand, if there is substantial evidence opposed to the motion – that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might reach different conclusions – then the motion was properly denied. *Id.*

III.

The Internal Revenue Code requires employers to withhold from employees' wages federal income taxes and social security contributions. 26 U.S.C. §§ 3102 and 3402. The employer holds these funds "in trust" for the United States. 26 U.S.C. § 7501(a). When a corporate employer fails to pay over the trust funds, § 6672(a) of the Code imposes a penalty equal to the entire amount of the unpaid taxes on "any person" required to collect, account for, or pay over the withheld taxes, who "willfully" fails to do so. Liability for the penalty is established if a person is a "responsible person"[6] who "willfully" failed to pay over with withheld taxes. *Turnbull v. United States,*

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[6] In *Slodov v. United States,* 436 U.S. 238, 246 n. 7, 98 S.Ct. 1778, 1785 n. 7, 56 L.Ed.2d 251 (1978), the Court noted that cases decided under § 6672 generally refer to the "person required to collect, truthfully account for, and pay over any tax imposed by this title" by the phrase "responsible person." Thus, a responsible person is any person who performs any one of the three functions specified in the statute. *Id.* at 250, 98 S.Ct. at 1787.

929 F.2d 173, 178 (5th Cir. 1991); *see also Raba v. United States*, 977 F.2d 941, 943 (5th Cir. 1992); *Gustin v. United States*, 876 F.2d 485, 491 (5th Cir. 1989); *Wood v. United States*, 808 F.2d 411, 414 (5th Cir. 1987); *Howard v. United States*, 711 F.2d 729, 733 (5th Cir. 1983). In § 6672(a) cases, once the Government offers an assessment into evidence, the burden of proof is on the taxpayer to disprove his responsible-person status or willfulness. *See Morgan v. United States*, 937 F.2d 281, 285 (5th Cir. 1991); *Brounstein v. United States*, 979 F.2d 952, 954 (3d Cir. 1992); *Oliver v. United States*, 921 F.2d 916, 919 (9th Cir. 1990); *Ruth v. United States*, 823 F.2d 1091, 1093 (7th Cir. 1987).[7]

The IRS contends that the undisputed evidence presented at trial establishes that Barnett is a "responsible person" who "willfully" failed to pay withholding taxes. In particular, the IRS asserts that: (i) Barnett possessed sufficient indicia of authority to be a responsible person for purposes of § 6672 and (ii) his failure to pay the overdue taxes was willful because he was responsible for making payments to creditors other than the United States after he learned that the withholding taxes were past due. Thus, the IRS argues, it was entitled to judgment as a matter of law on the issue of Barnett's liability under § 6672. After a careful review of the record, we agree.

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[7] We note that, in the instant case, the Government at trial offered a certified copy of the assessment against Barnett.

A. Was Barnett a "Responsible Person"?

Although this court has treated the issue of whether one is a " responsible person" under § 6672 as essentially a question for the fact-finder,[8] other circuits have treated the issue as a mixed question of law and fact in view of certain recurring fact patterns that require a finding of responsibility "as a matter of law."[9] Even treating such a finding as a pure factual question, we cannot ignore the extensive caselaw that narrowly constrains a factfinder's province in § 6672 cases.[10] Thus, although "the facts

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[8] *See, e.g., Gustin v. United States,* 876 F.2d 485, 492 (5th Cir.1989) (affirming district court's finding that defendant was responsible person as "not clearly erroneous")

[9] *See, e.g., Hochstein v. United States,* 900 F.2d 543, 547 (2d Cir.1991) (*citing Thibodeau v. United States,* 828 F.2d 1499, 1503 (11th Cir.1987); *see also Johnson v. United States,* 565 F.Supp. 253, 256 (S.D.Tex.1983) (after applying legal principles established by Fifth Circuit § 6672 cases to facts of case, holding that "as a matter of law" party was responsible person).

[10] Whether treating the issue as a factual question or mixed question, countless courts have found responsibility as a matter of law. *See generally* Annotation, *Construction, Application, and Effect with Respect to Withholding, Social Security, and Unemployment Compensation Taxes, of Statutes Imposing Penalties for Tax Evasion or Default,* 22 ALR3d 8, § 4, at 49-77 & Supp., at 4-10 (collecting cases); Annotation, *When are Persons Other Than Owners, Directors, Officers, and Employees Potentially Liable for Penalties Under IRC* § 6672 (26 USCS § 6672) *Concerning Failure to Collect and Pay Over Tax,* 84 ALR FED. 170 §§ 3-31 (collecting cases).

In a great number of cases, this court has held that a party was a "responsible person." In those cases, either we reversed a jury or trial court's verdict by holding that no reasonable fact-finder could fail to find responsibility, or we affirmed a fact-finder's verdict finding responsibility. *See, e.g., Raba v. United*

. . . are critical in . . . any § 6672 cases," *Commonwealth National Bank of Dallas v. United States*, 665 F.2d at 752, we tend to agree with the other circuits that have held that certain facts will almost invariably prove dispositive of a finding of responsibility.

We first review those principles of law that narrowly constrain a factfinder's role in a § 6672 case. As we observed in *Gustin*, "[t]his circuit generally takes a broad view of who is a responsible person." 876 F.2d at 491; *see also Bowlen v. United States*, 956 F.2d 723, 728 (7th Cir.1992) (noting "broad net" of § 6672 regarding who is deemed a "responsible person"). Responsibility is simply a threshold question under § 6672; it is determined by looking to one's status within a corporation – that is,

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States, 977 F.2d 941 (5th Cir. 1992); *Morgan v. United States*, 937 F.2d 281 (5th Cir. 1991); *Turnbull v. United States*, 929 F.2d 173 (5th Cir.1991); *McCray v. United States*, 910 F.2d 1289 (5th Cir.1990); *Gustin v. United States*, 876 F.2d 485 (5th Cir.1989); *Bowen v. United States*, 836 F.2d 965 (5th Cir. 1988); *Wood v. United States*, 808 F.2d 411 (5th Cir.1987); *Howard v. United States*, 711 F.2d 729 (5th Cir.1983); *Commonwealth National Bank of Dallas v. United States*, 665 F.2d 743 (5th Cir.1982); *Brown v. United States*, 591 F.2d 1136 (5th Cir.1979); *Mazo v. United States*, 591 F.2d 1151 (5th Cir.1979); *Hornsby v. IRS*, 588 F.2d 952 (5th Cir. 1978); *Neckles v. United States*, 579 F.2d 938 (5th Cir.1978); *Genins v. United States*, 489 F.2d 95 (5th Cir. 1974); *Moore v. United States*, 465 F.2d 514 (5th Cir. 1972); *Brown v. United States*, 464 F.2d 590 (5th Cir. 1972); *Liddon v. United States*, 448 F.2d 509 (5th Cir.1971); *Gefen v. United States*, 400 F.2d 476 (5th Cir.1968), *overruled on other grounds, United States v. McMahan*, 569 F.2d 889 (5th Cir. 1978) (en banc); *Hewit v. United States*, 377 F.2d 921 (5th Cir.1967); *cf. McCullough v. United States*, 442 F.2d 1011 (5th Cir.1971) (rev'g district court's grant of directed verdict in favor of taxpayer and ordering that issue be submitted to jury).

one's duty and authority to withhold and pay taxes. Unlike the willfulness element of the statute, responsibility does not require knowledge that one has that duty and authority. *See Mazo*, 591 F.2d at 1156; *see also Howard*, 711 F.2d at 734. The crucial inquiry is whether the person had the "effective power" to pay the taxes – that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed. *See Raba*, 977 F.2d at 943; *Gustin*, 876 F.2d at 491-92; *Howard*, 711 F.2d at 734. Thus, a person may be a responsible person for purposes of the statute even though he does not know that withholding taxes have not been paid, *see Mazo*, 591 F.2d at 1156, and he does not cease to be a responsible person merely by delegating the responsibility to others, *see Gustin*, 876 F.2d at 491. Moreover, the statute expressly applies to "any" responsible persons, not just to the person *most* responsible for the payment of the taxes. *Howard*, 711 F.2d at 737. There may be – indeed, there usually are – multiple responsible persons in any company. That another person in the company has been delegated the jobs of withholding and paying employees' taxes and generally paying creditors is beside point.[11] The crucial inquiry is whether a party such as Barnett, by

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[11] *See Gustin*, 876 F.2d at 491 ("One does not cease to be a responsible person merely by delegating that responsibility to others. . . . "); *Commonwealth*, 665 F.2d at 757 ("A responsible person is one who has a final or significant – even if not exclusive – word as to which bills or creditors should be paid."); *Neckles*, 579 F.2d at 940 ("Although the appellant may not have always had the 'final say about paying creditors, . . . he did have significant control over disbursements."); *Liddon*, 448 F.2d at 512-13 (same); *see also Bowlen v. United States*, 956 F.2d 723 (7th Cir.1992); *Hochstein v. United States*, 900 F.2d 543, 547 (2d Cir.1990).

virtue of his position in (or vis-a-vis) the company, could have had "substantial" imput into such decisions, had he wished to exert his authority.

Like other circuits, *see, e.g., Bowlen v. United States,* 956 F.2d 723, 728 (7th Cir.1992); *O'Connor v. United States,* 956 F.2d 48, 51 (4th Cir.1992); *George v. United States,* 819 F.2d 1008, 1011 (11th Cir. 1987), our cases have looked to a number of circumstantial indicia of responsible person status when an party lacks the precise responsibility of withholding or paying employees' taxes. As the court explained in *O'Connor,* the question of the existence, *vel non,* of a duty to comply with § 6672 "is considered in light of the person's authority over an enterprise's financial or general decisionmaking." *Id.* at 51. The factors we consider are indicia of such an authority. We ask whether such a person: (i) is an officer or member of the board of directors; (ii) owns a substantial amount of stock in the company; (iii) manages the day-to-day operations of the business; (iv) has the authority to hire or fire employees; (v) makes decisions as to the disbursement of funds and payment of creditors; and (vi) possesses the authority to sign company checks. *See Raba,* 977 F.2d at 941; *Turnbull,* 929 F.2d at 178; *Gustin,* 876 F.2d at 492; *Howard,* 711 F.2d at 734. No single factor is dispositive. *See Raba,* 977 F.2d at 945. *See generally* Annotation, 84 ALR Fed. 170 at § 10-20 (collecting cases discussing the various factors).

In the case before us, the undisputed evidence establishes that Barnett's position in the Company met every one of these criteria. Indeed, Anderson and Barnett's testimony establishes that during the three quarters of 1981 at issue here, Barnett: (i) owned twenty percent of the Company's stock; (ii) served as a director during each

of the quarters for which taxes were not paid; (iii) served as vice president until March 27, 1982, when he took over as president; (iv) was responsible for the day-to-day operations of the company, including hiring and firing employees; (v) purchased supplies with Company funds, reviewed vendor invoices before forwarding them to Anderson for payment, and made recommendations regarding which creditors to pay; and (vi) had check-signing authority on all three of the Company's checking accounts, and at least once signed pay-roll checks as vice president. Moreover, we observe that Barnett, in his capacity as vice president, obviously possessed enough authority over corporate affairs to independently investigate Anderson and ultimately force him out. *A fortiori,* Barnett was a responsible party during the first quarter of 1982, when he assumed the presidency of the Company and actually took direct control of the payroll duties. Under well-established precedent, then, Barnett would certainly qualify as a "responsible person" under § 6672 for all four quarters at issue.

Barnett argues, however, that this case is "entirely distinguishable" from "most cases" applying § 6672 and, thus, our traditional multi-factor analysis is inapposite in his case. Specifically, he contends that, despite the presence of the above noted indicia of authority, he had no effective control over the finances because the Company was run out of two offices. According to Barnett, "[f]rom a practical and logistical standpoint, [he] had no means of making sure the [tax] payments were being made, nor of finding out about their delinquency." We find this argument unpersuasive.

We first observe that cases *not* finding § 6672 responsibility are relatively few and far between. Our research has revealed only three such cases decided by this court – only one of which has any possible relevance to the instant case – as contrasted with almost two dozen cases involving analogous fact-patterns[12] in which we have held that a party *was* a "responsible person." *See Hill v. United States,* 368 F.2d 67 (5th Cir.1966).[13] In *Hill,* we agreed with the district court that a bank that loaned money to a company that failed to pay withholding taxes was not a "responsible party" because the bank had no control over the corporation's finances, 368 F.2d at 622-24. *But cf. Commonwealth National Bank,* 665 F.2d at 748-747 (holding bank and its officers liable because they exercised control over debtor company's finances). We do not

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[12] *See supra* note 11.

[13] In *McCullough v. United States,* 462 F.2d 588, 590 (5th Cir.1972), we held that a party was not a "responsible person" at the time that he failed to pay withheld taxes solely because it was undisputed that he was not an arguably responsible person at the time that the taxes were "collected." Applying the plain language of the statute – which speaks of a "person required to collect, truthfully account for, *and* pay over" employees' taxes, *see* § 6672 – we held that the party was not responsible under the statute because he assumed his arguably responsible-person status *after* the taxes had been collected. As we noted in *supra* note 8, however the Supreme Court has since interpreted § 6672 in the disjunctive. In *Fitzgibbons v. United States,* 522 F.2d 1353, 1354 (5th Cir.1975) (per curiam), we reversed a finding of responsibility, but only to the extent that a corporate officer's responsibility under § 6672 terminated at the point that she left her position at the company. Thus, the finding of no responsibility in both *McCullough,* and *Hill* have no relevance whatsoever to the instant case.

believe *Hill* supports Barnett's arguments because he – unlike the bank in *Hill* – possessed substantial authority, even if not always exercised, over his company's finances.

Nor do other courts' cases that have held that a party is not a "responsible person" support Barnett's argument. First, none has involved a company official whose lack of responsibility related to his or her location in a satellite office. Instead, such cases have typically involved attempts by the Government to hold responsible: i) a spouse or child of a company official,[14] ii) a company official whose leadership or decision-making capacity was "nominal,"[15] or iii) some affiliated party, such as an outside accountant, who lacked control of the company's finances.[16] *See generally* Annotation, 22 ALR3d at § 4[c], at 67-77 & Supp., at 11-12 (collecting cases). Such cases, thus, have involved parties whose connection with company affairs were considerably more attenuated than a company official such as Barnett.

We believe that to permit corporate officers who otherwise would have § 6672 responsibility to avoid that status simply because they operate out of an office of the

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[14] *See, e.g., United States v. Bloom,* 58-1 USTC ¶ 9502 (N.D.Cal.), *aff'd* 272 F.2d 215 (9th Cir. 1959) (corporate president's wife); *Philipson v. United States,* 55-1 USTC ¶ 9466 (E.D.N.Y.1955) (22-year old daughter of corporate officer).

[15] *See, e.g., French v. United States,* 180 F.Supp. 773 (E.D.N.Y.1960) (president of corporation, who [sic] title was purely nominal and who has not otherwise affiliated with company, was not compensated, had no authority to hire or fire employees, and had no connection with company's payroll).

[16] *See, e.g., Haffa v. United States,* 516 F.2d 931 (7th Cir.1975).

company other than the one where tax and payroll matters are handled "would open the door to a host of evasive tactics." *See Raba*, 977 F.2d at 945. Moreover, such an exception to the broad definition of responsibility would create a slippery slope: what would distinguish this case from one where a company has offices spread out in a single city, or even one where a company has offices spread out in a single skyscraper? *See Turnbull*, 929 F.2d at 179 ("We find . . . that the location of Foster's office does not determine whether he was a 'responsible party.' "). Finally, we believe that the rationale for the broad net of § 6672 responsibility serves a valuable prophylactic purpose: it encourages officers, directors, and other high-level employees to stay abreast of the company's withholding and payment of employee's taxes. In the instant case, Barnett admitted that – despite his geographical separation from Anderson – he asked Anderson for monthly reports on the Company's finances and simply relied on Anderson's assurances. In this day and age of sophisticated communication facilities, even a remote satellite office does not have to be in the dark about what goes on in the company's home office. In sum, we believe that not only is it a bad business practice for a high-level company official such as Barnett to fail to monitor his company's finances, it also subjects him to being held a responsible party under § 6672.[17]

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[17] We note that at trial Barnett readily admitted that he *intended* to monitor Anderson's control of the financial side of the company. Barnett claimed, however, that he simply was "too busy" to do so.

We conclude that the undisputed evidence presented at trial so overwhelmingly leads to the conclusion that Barnett was a responsible party that a reasonable juror could not arrive at a contrary verdict.[18] Thus, the district court erred by refusing to grant the Government's renewed motion for judgment as a matter of law.

B. Did Barnett act "willfully"?

The sweeping net of § 6672 responsibility is not intended to unfairly impose actual liability on a person who, in failing to withhold and pay over employees' taxes to the IRS, did not exercise any actual knowing responsibility. As noted, *supra*, § 6672(a) will impose liability on a responsible person only if that person "willfully" failed to collect, account for, or pay over withheld taxes. Therefore, the willfulness inquiry is the sifter in most § 6672 cases.

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[18] In holding that a judgment as a matter of law was appropriate, we note the conclusion of the Eleventh Circuit, who similarly held, in a § 6672 case with quite similar facts, that the party was a responsible person "as a matter of law":

> The district court found George to be a responsible person because he admitted to be being a vice-president, director, and fifty percent shareholder of the corporation. Also, George testified that he was a signatory of the corporate bank account and had blank checks in his possession. Furthermore, George had the ability to hire and fire employees. Under these facts, we conclude as a matter of law that appellant was a responsible person within the meaning of the statute.

George v. United States, 819 F.2d 1008, 1011 (11th Cir.1987).

Although Barnett's jury did not reach this issue, the IRS argues on appeal that the undisputed evidence presented at trial also establishes Barnett's willful failure to pay withheld taxes. Specifically, the IRS contends that it is entitled to judgment as a matter of law because Barnett made and allowed payments to creditors other than the United States after he had knowledge that withholding taxes for the four quarters at issue on this appeal had not been paid.

Willfulness under § 6672 requires only a voluntary, conscious, and intentional act, not a bad motive or evil intent. *Mazo*, 591 F.2d at 1154; *see also Gustin*, 876 F.2d at 492. Willfulness is normally proved by evidence that the responsible person paid other creditors with knowledge that withholding taxes were due at the time to the United States. *Gustin*, 876 F.2d at 492. "A considered decision not to fulfill one's obligation to pay the taxes owed, evidenced by payments made to other creditors in the knowledge that the taxes are due, is all that is required to establish willfulness." *Howard*, 711 F.2d at 736.

Barnett testified that he first learned on April 12, 1982, that Anderson had not paid the withholding taxes. Barnett further testified that, after April 12, he signed checks for payroll and to pay other creditors, including himself. Once he became aware of the tax liability, Barnett had a duty to ensure that the taxes were paid before any payments were made to other creditors. *Mazo*, 591 F.2d at 1154. Such undisputed evidence that he failed to do so would ordinarily establish willfulness as a matter of law. *Howard*, 711 F.2d at 735; *Mazo*, 591 F.2d at 1157.

Barnett argues, however, that he did not willfully fail to pay the past due taxes because any funds that were available to pay the accrued withholding taxes were "later-acquired funds." He contends that because a change in corporate control occurred when he replaced Anderson as president, he had no duty to pay the taxes from such purportedly later-acquired funds. In making this argument, Barnett relies on the Supreme Court's decision in *Slodov v. United States*, 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978). In *Slodov*, the Court held that the Government could not hold a person accountable under § 6672 if the only company funds available to pay withholding taxes over to the Government were funds acquired after the party assumed responsible person status within the corporation. *Id.* at 254, 98 S.Ct. at 1788. In light of our determination that Barnett was at all times a responsible person during the four quarters at issue on this appeal, we need not address this argument. Rather, as we have previously held, "[i]n the case of individuals who are responsible persons *both before and after withholding tax liability accrues* . . . there is a duty to use unencumbered funds acquired after the withholding obligation becomes payable to satisfy that obligation; *failure to do so when there is knowledge of the liability* . . . constitutes willfulness." *Mazo*, 591 F.2d at 1157 (emphasis added); *see also Turnbull*, 929 F.2d at 179-80; *Wood*, 808 F.2d at 416; *Garsky v. United States*, 600 F.2d 86, 91 (7th Cir.1979). Barnett admitted at trial that he knew, beginning April 12, 1982, that withholding taxes were due *for the previous four quarters.*

Barnett further argues that there were no "unencumbered" funds with which to pay the past due taxes. *See*

Mazo, 591 F.2d at 1154 ("[R]esponsible persons are subject to a duty to apply any available unencumbered funds to reduction of accrued withholding tax liability. . . . "). Specifically, he asserts that all of the Company's accounts receivable deposited into the Company's bank accounts after April 12, 1982, were pledged as collateral for loans. The IRS challenges this assertion, as well as a related assertion made by Barnett that he was not required to pay over available funds which constituted "loan proceeds" – which, presumably, Barnett believed were also "encumbered" in some sense.

We initially note the operative definition of "encumbered," which we adopt from the Eighth Circuit's § 6672 jurisprudence. In *Honey v. United States*, 963 F.2d 1083 (8th Cir.1992), the court stated:

> [w]here the taxpayer's discretion in the use of funds is subject to restrictions imposed by a creditor holding a security interest in the funds which is superior to any interest claimed by the IRS, the funds are regarded as encumbered if those restrictions preclude a taxpayer from using the funds to pay the trust fund taxes.

Id. at 1090 (citation omitted).

We next observe that the burden to prove that the loan proceeds and accounts receivable deposited into the Company's bank accounts after April 12, 1982, were "encumbered" falls on Barnett, as that issue is part of the larger willfulness inquiry. *See Raba*, 977 F.2d at 946 n. 6 (*citing Mazo*, 591 F.2d at 1155).

We agree with the IRS that, based on the record before us, the accounts receivable deposited into the

Company's bank accounts between April 12, 1982, and the date when the Company filed for bankruptcy were, as a matter of law, *un*encumbered for purposes of § 6672. This is because, under the above definition of "encumbered," Barnett entirely failed to prove that he lacked the discretion to use the accounts receivable and loan proceeds deposited after April 12, 1982, to pay the accrued withholding taxes. Rather, he simply introduced testimony that the accounts receivable were "pledged" as collateral to Metro Savings and Loan. As the Government correctly states in its reply brief, "there is no evidence in the record establishing that Metro['s] interest in the accounts receivable prevented taxpayer from using those funds for the payment of the corporation's tax liability. Nor is there any evidence showing that any of the proceeds of the accounts receivable were actually paid out to Metro. . . . " The same is true of the loan proceeds deposited into the Company's bank accounts after April 12, 1982. Thus, we agree with the Government that, as a matter of law, Barnett "willfully" failed to pay the $492,101.12 in available, unencumbered funds deposited into Company bank accounts after Barnett became aware that the accrued withholding taxes were due.

We disagree, however, with the Government's argument that the $425,000 in uncollected accounts receivable due from one of the company's customers may be considered as a liquid asset that could have been used in part by Barnett to pay the balance of the accrued taxes, assuming that Barnett had paid over the $492,101.12. That amount was simply not yet available for Barnett to use to pay the accrued taxes. Finally, although at trial the Government contended Barnett was also liable regarding an additional

$375,000 deposited into one of the Company's accounts on April 14, 1982 – which was immediately offset by the depository bank for payment of an overdue Company loan – on appeal the Government has abandoned that particular claim.[19]

IV.

In sum, we conclude that the undisputed evidence presented at trial establishes, as a matter of law, that Barnett was a responsible person who willfully failed to pay over withholding taxes. We REVERSE the judgment of the district court denying the IRS's motion for judgment as a matter of law and RENDER judgment for the IRS. Thus, Barnett is liable for the amount of $492,101.12, minus the $2,582.24 in partial payment and credits, plus statutory interest and additions. We REMAND to the district court for the entry of judgment following the computation of statutory interest and additions.

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[19] We also note that, on appeal, the Government makes no claim to any unencumbered assets that the Company may have possessed *as of* April 12, 1982. Rather, the Government only focuses on assets received *after* that date. Furthermore, neither at trial nor on appeal has the Government argued that Barnett could be held liable as a willful and responsible party during the last three quarters of 1981 based on the theory that Barnett was reckless in failing to check to see that withholding taxes were being paid to the Government. *See Mazo*, 591 F.2d at 1154 ("The willfulness requirement is satisfied if the responsible party acts with a reckless disregard of a[n] . . . obvious risk that trust funds may not be remitted to the Government. . . . ").

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

RICHARD D. BARNETT	*	CIVIL ACTION
	*	NO. 88-3164
VERSUS	*	
	*	SECTION "L"
UNITED STATES OF AMERICA	*	JUDGE UNASSIGNED
	*	MAGISTRATE METHVIN
**********	*	

JUDGMENT
(Filed Dec. 17, 1990)

In consideration of this court's ruling of today on the motion for Partial Summary Judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the United States of America and against Charles R. Anderson in the amount of $604,509.91 together with interest thereon as provided by 26 U.S.C. sections 6621 and 6622 from August 20, 1984 until today's date and thereafter as provided by 28 U.S.C. section 1961(c)(1) and 26 U.S.C. sections 6621 and 6622.

Lafayette, Louisiana, this 14th day of December, 1990.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES
DISTRICT JUDGE
Judgment Entered 12-19-90
By /s/ Suzanne Mitchell
Copy To Breaux
Lunnen
Crapo
Anderson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

RICHARD D. BARNETT	*	CIVIL ACTION
	*	NO. 88-3164
VERSUS	*	
	*	SECTION "L"
UNITED STATES OF AMERICA	*	JUDGE UNASSIGNED
	*	MAGISTRATE METHVIN
	*	
**********	*	

RULING

(Filed Dec. 17, 1990)

Now before the court is a Motion for Partial Summary Judgment filed by United States of America, (the "Government") on its counterclaim against the defendant in counterclaim, Charles R. Anderson, ("Anderson"). Anderson does not oppose this motion. Considering the uncontested facts and for the following reasons, the motion is GRANTED.

The court adopts the Government's Statement of Material Facts as its own.

FINDINGS OF FACT

1.

During the last three quarters of 1981 and the first quarter of 1982, Anderson-Barnett Drilling Co., Inc., (the "Corporation") failed to pay over to the United States the federal income and social security taxes withheld from its employees' wages during these quarters.

2.

During the same period, at least until March 27, 1982, additional defendant on counterclaim Charles R. Anderson, ("Anderson") served as the president of the Corporation. (Richard D. Barnett is also a defendant on counterclaim).

3.

During this same period Mr. Anderson served on the Board of Directors of the Corporation.

4.

Mr. Anderson was a shareholder of the Corporation during this period.

5.

Mr. Anderson was also the Corporation's Chief Financial Officer during this period.

6.

During the period Mr. Anderson served the Corporation, its financial operations were handled out of its Lake Charles office where Mr. Anderson was resident.

7.

Invoices to the Corporation were forwarded for processing to its Lake Charles office.

8.

At all times relevant to this motion, Mr. Anderson served as the Corporation's comptroller.

9.

As comptroller, he supervised the accounting functions of the Corporation.

10.

As president of the Corporation, Mr. Anderson had supervisory authority over each and every corporate employee.

11.

During the last three quarters of 1981 and the first quarter of 1882, at least until March 27, 1982, Mr. Anderson was involved in the day-to-day management of the Corporation.

12.

During this same period he had signatory authority on the Corporation's checking account at Calcasieu Marine National Bank in Lake Charles.

13.

Only one signature was needed to validate a check written on said checking account.

14.

During the time he was president of the Corporation, Mr. Anderson had the authority to negotiate loans on behalf of the Corporation.

15.

During the last three quarters of 1981 and the first quarter of 1982, Mr. Anderson had access to the Corporation's checkbooks.

16.

Mr. Anderson has admitted that, during the last three quarters of 1981 and the first quarter of 1982, he had the full power and authority to determine the priority of corporation disbursements.

17.

He also admits that he became aware that the Corporation failed to deposit the federal income and social security taxes withheld from its wages as soon as the Corporation failed to make these deposits.

18.

Mr. Anderson further admits that it was he who decided the Corporation would not make these deposits.

19.

Mr. Anderson admits further that, during the last three quarters of 1981 and the first quarter of 1982, the Corporation would have had sufficient funds to pay over to the United States the federal income and social security taxes withheld from its employees' wages if creditors other than the United States had not been paid.

20.

He admits that, even after he became aware that the Corporation was not depositing the taxes withheld from the wages of its employees, creditors of the Corporation other than the United States were paid.

21.

He admits to having authorized these payments.

22.

He admits that there are no facts to dispute the claim of the United States that he was a responsible officer of the Corporation who willfully failed to pay over to the United States the federal income and social security taxes withheld from the wages of its employees during the last three quarters of 1981 and the first quarter of 1982.

23.

On August 20, 1984, a duly authorized delegate of the Secretary of the Treasury made an assessment of a 100 percent penalty pursuant to Section 6672 of the Internal

Revenue Code (Title 26 U.S.C.) against Mr. Anderson in connection with the failure of the Corporation to pay over the withholding and FICA taxes withheld from the wages of its employees for the last three quarters of 1981 and the first quarter of 1982 in the amount of $604,509.91; interest on this liability in the amount of $183,168.68 was assessed on February 9, 1987.

24.

Charles R. Anderson has paid nothing against said assessment.

CONCLUSIONS OF LAW

As employers are responsible for withholding federal social security and income taxes from their employee's checks, the Government has recourse under 26 U.S.C. §6672 against "persons responsible" for collection and payment of these taxes when these taxes go unpaid. Responsibility under Section 6672 is a matter of status, duty and authority. *Gustin v. United States*, 876 F.2d 485 (5th Cir. 1989). Factors to consider when deciding whether or not a person is "responsible" include authority over disbursements of assets and authority over the hiring and firing of personnel among other considerations. Based on the uncontested facts, Mr. Anderson is a responsible person.

The Government must also show that Mr. Anderson willfully failed to collect the taxes. Willfulness may be found when a person responsible under Section 6672 fails

to pay these taxes and pays other creditors instead. *Howard v. United States*, 711 F.2d 729, 736 (5th Cir. 1983). The uncontested material facts show that Mr. Anderson willfully failed to pay these taxes to the Government.

Accordingly, the Motion for partial Summary Judgment is GRANTED.

Lafayette, Louisiana, this 14th day of December, 1990.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES
DISTRICT JUDGE

COPY SENT
DATE 12-19-90
BY SM
TO: Breaux
Lunnen
Crapo
Anderson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

RICHARD D. BARNETT	C.A. 88-3164-L
vs.	JUDGE HAIK
UNITED STATES OF AMERICA	MAGISTRATE METHVIN

JUDGMENT
(Filed May 11, 1992)

The Motion for Judgment as a Matter of Law, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial filed by the United States of America came on for hearing before the Court on April 16, 1992.

Present: Neal Fowler, attorney for the United States of America

Warren D. Rush, attorney for Richard D. Barnett

Considering the law, evidence and argument of counsel:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Judgment as a Matter of Law, Motion for Judgment Notwithstanding the Verdict,

and Motion for New Trial filed by the United States of America be and the same are denied.

Lafayette, Louisiana, this 11th day of May, 1992.

/s/ Richard T. Haik
UNITED STATES
DISTRICT JUDGE

Judgment Entered 5-14-92
By Teresa Ferguson
Copy To Rush
Breaux
Crapo
Lunnen
Anderson
Barnett
Fowler

[p. 1] UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION
(Filed Aug. 3, 1992)

RICHARD BARNETT

VERSUS

INTERNAL REVENUE SERVICE

CIVIL ACTION
NO. 88-3164
April 16, 1992

Transcript of proceedings
before the Honorable Richard T. Haik, Sr.,
United States District Judge.

APPEARANCES:

On Behalf of the Plaintiff:

Rush & Rush
BY: WARREN D. RUSH
GINA R. CALOGERO
P. O. Box 53713
Lafayette, Louisiana 70505

On Behalf of the Defendant:

U.S. Department of Justice
BY: NEAL FOWLER
P. O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

U.S. Attorney's Office
BY: THOMAS B. THOMPSON
600 Jefferson Street
Lafayette, Louisiana 70501

Proceedings recorded by mechanical stenography; transcript produced by computer.

[p. 2] PROCEEDINGS.

THE COURT: Barnett and the United States. There is a Judgment NOV, and alternatively for a new trial.

The government filed the motion. I am sure they will want to go first.

Gentlemen, we are going to keep it brief. Was it a two or three day?

MR. FOWLER: Two-and-a-half days, Your Honor. We squeezed a two day trial into two-and-a-half days.

THE COURT: All right. I am ready when you are ready.

MR. FOWLER: May it please the Court, opposing counsel, Neal Fowler.

I know you are familiar with our briefs in this matter, very familiar with the case that was tried a month ago. It's fairly simple what we have before us, Your Honor, the issue before the Court – the issue that the jury –

THE COURT: Excuse me.

(Discussion off the record)

MR. FOWLER: The only issue the jury actually determined was the issue of responsibility. We moved for directed verdict at the end of the trial. The jury came back against the United States. We have now moved for judgment as a matter of law, because of the facts of the case

and the law of the Fifth Circuit is clear that Mr. Barnett was a responsible [p. 3] person.

The indicia responsibility is fairly straight forward. Holding a corporate office, holding a membership on the Board of Directors is one of those factors. Ownership of stock, control of financial affairs, authority to disburse corporate funds, managerial responsibility, the ability to hire and fire are all factors that are very significant.

Before I get into those factors–

THE COURT: We are not going to get into those factors.

Let me – Let's sum it up real quick because I am going to ask you a few questions.

MR. FOWLER: Very good. First, I just wanted to touch base with why I think the jury, I guess, made a mistake regarding its verdict in this case.

I would just touch very briefly on some things made in closing argument, some blatant appeals to sympathy. If you look over the pages of 89 and 92 of the third transcripts, there was some objections made, very clear appeals that were improper. There was misstatements made about Mr. Anderson's testimony about him claiming he was totally responsible and different things about him proving up the things for Mr. Barnett. Those were not part of the evidence in the case.

There was a lot of statements that Mr. Barnett paid subsequent taxes on Page 100 of that transcript. That's [p. 4] totally irrelevant. That was objected to. They made a big deal about Mr. Anderson, himself, being liable. That clearly is true but not relevant to Mr. Barnett's liability.

They also stated that we called no witnesses and there was an objection. He tried to qualify that and that – again, that is something that tended to mislead the jury. I think based upon a lot of misstatements made, that the jury could very easily have been confused; and based upon the question from the jury room, it's clear they were confused.

They were asking about payroll after the period at issue, which had nothing at all to do with the periods at issue, Your Honor. And I think it's clear that the jury did not make a reasonable decision and because of that, the Court has the obligation to go beyond that to review the evidence to apply the facts to that; and once that is done, we are sure the Court will rule in our favor.

I can touch very briefly on the factors, if you would like, that is in our motion and memorandum.

THE COURT: I have read your memorandum.

Mr. Rush, you want to respond briefly?

MR. RUSH: Yes, Your Honor.

Your Honor, it's hard to argue with the law that was quoted in the United States' brief, because it's basically Horn Book law. And as you read down the cases, most all of the rules of law that are cited in the brief are correct.

[p. 5] The primary – The problem is applying that law to these facts in the *Slidoff* case we cited to Your Honor until you are probably tired of hearing it. But, if you look at the first page of that decision where the Court outlines the three decisions in *Slidoff*: One, you have to trace the funds. That's a big issue. Two, the Court said there is no personal liability without fault. And the third

one is that the subsequent funds generated or if they come from a source that are not the earnings during the taxing period, this can't be used as the basis for holding the defendant or the plaintiff in this case responsible for the taxes.

So, you know, Your Honor heard the evidence, and I don't have to repeat all that, except to say that the core questions that were asked of the witnesses and primarily Mr. Barnett as to what power he had to pay those taxes and all of these cases still turn around that this – that this plaintiff had to have had the power to control the funds and make the election to either pay or not pay the taxes. He did not have that. All the witnesses testified to that and, you know, I could go on and argue that.

Each of the testimony of the witnesses, and Your Honor heard it, and I am not going to repeat it all except to say that it was really a lopsided case in favor of the plaintiff in this matter; that he did not have the power; he did not have the control; he did not make the election; and as [p. 6] a result, he was – he was like an injured party, himself.

THE COURT: Brief response, Mr. Fowler?

MR. FOWLER: Very brief. *Slidoff* is not at issue unless Mr. Barnett came into effect after the period at issue. He was responsible during the period of time, and so we don't have to trace the funds that was raised many times during the trial but not really something relevant here, Your Honor.

Very briefly, the evidence was very strong in favor of the United States; the taxpayer did not carry his burden

to the jury. A reasonable jury would be compelled to find that Mr. Barnett was a responsible person because he had the status, duty and authority to pay these taxes. He was vice-president –

THE COURT: Let me tell you why I think you have a problem. I don't think that jury believed that he had the authority, because he didn't have the control. I think what that jury did was they looked at your chief number one star witness, Mr. Charles Anderson, who is a CPA, who controlled the books, who controlled the money and who actually stated on the stand from what I recall that he hid everything from everybody else. And I think the jury looked at that and said, "Listen, United States, I think everybody has got to pay taxes. But, when you have an individual who is taking total control, who is lying to the other members, it's just not fair. It's just not fair." And it's not fair. I agreed with the jury's decision. [p. 7] I think their decision was correct. I don't think that going after this gentleman is fair under these circumstances, considering the fact that Mr. Anderson hid everything from Mr. Barnett.

If they had waived the jury – And this is one of the few times they can bring something that the IRS does to a jury. That jury spoke loud and clear to me. And I think under the circumstances, based on the testimony of Mr. Anderson – that he hid everything from everybody else, he took control, he was totally in control, he kept the funds there – Mr. Anderson was the and is the responsible party. And, I think that jury listened to all that testimony quite carefully and gave their judgment and this decision on the testimony that was produced in

court, not from the arguments of counsel, but from the testimony.

I have only set aside one jury verdict in seven years. And to the amazement of most of the defense attorneys in this crew, I set aside a huge award to a plaintiff and granted a new trial after setting it aside. But, I do that very, very carefully, and I am not going to do it in this case with a jury, I think, who had more than enough evidence to return a verdict in favor of Mr. Barnett in this case.

MR. FOWLER: Okay. Without belaboring it, can I make one statement?

THE COURT: Sure. Make it short.

[p. 8] MR. FOWLER: I will, very short. Our resistance remains with all due respect that he became a responsible person during the first quarter of 1982.

THE COURT: I understand that. And the Fifth Circuit may agree with you, but I don't. I think there was enough evidence presented that a reasonable jury of reasonable people could differ on that, and they obviously agreed with Mr. Barnett under the circumstances. I think if you base it under the circumstances and the arguments, I think with that – implicit with that is whether or not you believe Mr. Barnett. And how do you handle the testimony of Mr. Anderson? I think if you follow the strict case law that you cited and you put – and you put Mr. Barnett in the position that he should have known – I think generally a person in that position should have known – but I think when you have someone who almost commits a fraud upon the rest of the stockholders and the

personnel – and that was close to what he did – I don't think you can hold that person liable for those taxes. But for that, I think you would have won. But for that, I would have set it aside. If that man had not gotten up there and said, "I hid it from everybody, I concealed it, I didn't let them know," but for that – for that testimony, I would have – I would be inclined to agree with you. But, I think the fact that he intentionally hid it from everyone else, I think that jury could respond as they did, and I think they were right under those [p. 9] circumstances.

MR. FOWLER: Thank you, Your Honor.

THE COURT: I'm going to deny the motions.

* * *

[p. 10] CERTIFICATE

I, Vivian A. Duhé, Official Court Reporter, in and for the United States District Court, do hereby certify that the foregoing 9 pages of typewritten matter constitute a true and correct transcript of my stenographic notes in the foregoing entitled cause.

I certify that the transcript fees and the format comply with those prescribed by the Court and Judicial Conference of the United States.

/s/ Vivian A. Duhé
Vivian A. Duhé

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

RICHARD D. BARNETT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant, v. CHARLES R. ANDERSON, Additional Defendant on the Counterclaim.	)	CIVIL NO. 88-3164 SECTION "L" JUDGE HAIK MAGISTRATE METHVIN

AMENDED JUDGMENT

(Filed June 16, 1992)

On motion of the defendant, United States of America, for entry of final judgment against the defendant on the counterclaim, Charles R. Anderson, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and this Court having previously held the defendant on the counterclaim liable for the responsible person penalties at issue by order dated December 14, 1990, and this Court having previously entered judgment upholding the verdict of the jury regarding the claims between Richard Barnett and the United States, it is hereby

ORDERED, ADJUDGED, AND DECREED that final judgment be entered in favor of the defendant United States against the defendant on the counterclaim Charles

R. Anderson in the amount of $604,509.91, together with any statutory interest and additions as provided by law from the date of the assessment, August 20, 1984;

ORDERED, ADJUDGED, AND DECREED that final judgment be entered in favor of the plaintiff Richard Barnett against the defendant United States in the amount of $3,886.24, together with interest on such amount as is provided by law and costs pursuant to 28 U.S.C., Section 1920; and

ORDERED, ADJUDGED, AND DECREED that the counterclaim of the defendant United States seeking to collect $604,509.91 from Richard Barnett in tax assessments related to the employment taxes of Anderson-Barnett Drilling Company, Inc. for the second, third, and fourth quarters of 1981 and the first quarter of 1982 is dismissed and the tax liens regarding this liability shall be cancelled and abated.

DONE and ORDERED this 15th day of June, 1991, in Lafayette, Louisiana.

/s/ Richard Haik
RICHARD HAIK
United States District Judge

Judgment Entered June 18, 1992
By Paula Shirly
Copy To Rush Lunnen
Breaux Anderson
Crapo Barnett
Fowler

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing motion to amend, memorandum of law in support thereof, and proposed judgment have been made this 9th day of June, 1992, by depositing a copy thereof in the United States mail, first class postage prepaid, addressed to the following:

Warren Rush, Esquire
202 Magnate Drive
Lafayette, Louisiana 70508

Charles Anderson
Post Office Box 1411
Lake Charles, Louisiana 70602

/s/ Neal Fowler
NEAL I. FOWLER
Trial Atty., Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 514-5901

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4733

RICHARD D. BARNETT,

Plaintiff-Appellee,

versus

INTERNAL REVENUE SERVICE,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed June 1, 1993)

(Opinion 04/28/93, 5 Cir., ___, ___ F.2d ___)

(June 1, 1993)

Before KING, EMILIO M. GARZA, Circuit Judges and COBB*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn D. King
United States Circuit Judge

REHG-6

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.